IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Robertson)
DIRK KEMPTHORNE, Secretary of the Interior, et al.	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' RESPONSE TO COURT'S NOTICE TO THE PARTIES AND TO PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING THE JUNE 2008 TRIAL

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RESPONSE TO THE COURT'S NOTICE TO THE PARTIES

This Court's Notice to the Parties (July 17, 2008) [Dkt. No. 3554] requests that Defendants answer two questions. The following sets forth Defendants' answers, with brief explanations based upon the record developed during the June 2008 trial.

> Question 1: What would be the outcome of the government's model if Dr. Angel's estimate for Tribal IIM were not 10% and 15%, but 0% at all times?
>
> Answer: The government's model would not generate an outcome different from that presented at the June 2008 trial.[1]
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> Question 2: What would be the outcome of the government's model if Dr. Angel's estimate for Tribal IIM were not 10% and 15% respectively, but 5% and 10% over the same periods?
>
> Answer: The government's model would not generate an outcome different from that presented at the June 2008 trial.

Defendants' model would not generate a different outcome because the government's analysis does not depend upon distinguishing among categories of collections and disbursements.

Defendants' evidence in June 2008 showed that it was not feasible to segregate all money coming into the IIM System among various categories, such as Tribal IIM funds. Tr. 502:3-7 (Herman) ("It's very difficult to do [that is, isolate collections that are related only to individual Indian accounts], ..."). As a result, Defendants' analysis of throughput considered total collections

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[1] Thus, the unexplained balance for the IIM System in DX-371 would still be $158.7 million; the mean unexplained difference for the IIM System in DX-464, based upon the Multiple Imputation analysis, would still be $159.9 million; and, as illustrated in DX-500, at a 97.5 % confidence level, the maximum difference for the IIM System that could not be explained as a result of the current state of the data would still be $833.5 million less $423.7 million, or $409.8 million.

and total disbursements, without regard to the character of the funds. Tr. 502:11-12 (Herman) ("We considered all collections into the system, not only those collections that went to individual accounts."); Tr. 502:14-15 (Herman) ("Again, we considered all of the disbursements from the system."). In describing the process that resulted in DX-371, Ms. Herman explained, "We've used all of the collections and disbursements into and out of the system as it's challenging to separate monies leaving from non-individual accounts." Tr. 537:6-8 (Herman); see Tr. 537:9-17 (Herman) (confirming that DX-371 presents table of total collections and disbursements).

Similarly, in contrasting the government's approach with Professor Cornell's approach,[2] Dr. Schueren explained during cross-examination:

> Q. Okay. And you went in to this that you were originally going to do it by adding the electronic fund transfers to the checks during the time period that Professor Cornell had calculated the disbursement rate. Correct?
>
> A. No. Let me -- what I was trying to do was to walk you through the data set that Professor Cornell had used to the data approach we had used. And I did not get all the way through that - my fault - when I last testified, and I'm awfully glad, and thank you, that you've allowed me to clarify it. Conceptually, we could have done that but we would have had to bring in other information, tribal and other matters, in order to prove -- but why do that? And we didn't do it. What we did was we simply took the data that was reported, which has everything in it. The collections that we're using are all collections from all sources, and the disbursements as well.

Tr. 1430:7-21 (Scheuren).

DX-371 did present an estimate of Tribal IIM in column E, and that estimate was based

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[2] Dr. Scheuren's testimony referred to Professor Cornell's model because it was presented when Dr. Scheuren was recalled by Plaintiffs to testify a second time with regard to NORC's analysis of Professor Cornell's model. NORC's analysis using Professor Cornell's model, but with accurate historical data, produced an unexplained difference of $31.5 million. See e.g., PX-176 at 3 ($14,426.58-$13,971.4=$455.18. $455.18 million minus the $423.7 million reported balance results in a difference of $31.48 million).

upon, among other things, Dr. Angel's estimates. To the extent the amounts in column E would be reduced, however, the "Other Receipts" amounts in column E would increase.[3] This is confirmed by footnote 4 to DX-371, which states, "Other funds in [the Other Receipts] column may include undifferentiated Interest, Judgment / Per Capita, and Tribal monies." DX-371, note 4 (emphasis added).

Because the character of the funds is not relevant to Defendants' throughput calculations, the unexplained balance resulting from Defendants' analysis will not change if the assumed Tribal IIM percentage changes. Funds that were collected as Tribal IIM have been included within the total collections amount, and the disbursement of those funds has also been included within the total disbursements amount. If the Court were to conclude that $158.7 million should be disgorged to Plaintiffs, such a conclusion would have to be based upon the tacit assumption that the unexplained balance of $158.7 million consists entirely of individual IIM account funds, with zero percent of the balance differences being Tribal IIM. But see Tr. 545:13-14 (Herman) ("It's possible that all of the various accounts within the system would be represented in [the $158.7 million unexplained difference]."). To the extent the unexplained difference is attributed to amounts other than individual IIM funds, e.g., bid deposits or Tribal IIM money, the amounts available for disgorgement to individual IIM accounts would decrease.

The percentage of Tribal IIM funds within total collections is only relevant to the Court's consideration of Plaintiffs' models, as presented by Professor Cornell and Dr. Palmer. In both

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[3] In this regard, it is notable that the estimate of Tribal IIM receipts was first presented as evidence during the October 2007 trial – not the June 2008 trial – in connection with the analysis set forth in AR-171. The "15 percent" figure appears as the estimate for fiscal years 1934-1985. AR-171 note 1.

cases, Plaintiffs' experts used the total collections presented by the government as starting points for their analyses.[4] Significantly, however, Plaintiffs' experts made no deductions for Tribal IIM from their collections amounts, and to the extent those funds were disbursed in forms not captured by the disbursement calculations made by Professor Cornell and Dr. Palmer, Plaintiffs' models understate disbursements and overstate the resultant balance. The Court noted this problem in the following exchange with Dr. Palmer:

> THE COURT: Just hold it a minute. Not to be too blunt about this, but are you saying that your idea of disbursements just ignores all those other boxes that Ms. Herman drew on that flowchart [in DX-370] that she made of third-party payments and Tribal IIM monies and transfers?
>
> THE WITNESS: What I'm trying to capture is the bottom box, effectively, what's disbursed to the individuals. She had talked about all these different boxes and then she was asked on her cross-examination, in 2007 can you identify what those disbursements are? And she said she couldn't. She hadn't been asked to, she didn't know what they were. So we're trying to capture what it is that's going to the individual Indians.
>
> THE COURT: But you're including as receipts everything in the top box, but you're taking out only what is a check, a CP&R check or an EFT payment. Is that basically it?
>
> THE WITNESS: I'm not exactly sure what's all in the top box of that system. If there are funds that go -- are flow-through funds to the tribal that aren't included in individual monies, then they wouldn't be included in our receipt accounts. If it was included, then we're not including it.
>
> THE COURT: As I understood Ms. Herman's testimony, these BB fund transfers have to be deducted from total receipts if you're going to understand disbursements correctly. And you're telling me you're not deducting it.
>
> THE WITNESS: If we could identify them in receipts, then they would be

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[4] Professor Cornell and Dr. Palmer made further adjustments to these amounts, such as their treatment of Osage headrights and Dr. Palmer's adjustments to certain collection amounts. E.g., PX-189-D (Dr. Palmer's rebuttal model increased receipts for 1923-1949 by dividing reported amounts by 0.77).

deducted, because we're not including them in disbursements.

Tr. 1633:17-1634:19 (Court and Palmer). Similarly, in response to the Court's inquiry, Dr. Scheuren explained, "[W]e looked at the total disbursements; [Professor Cornell] only looked at CP&R. But in order to get from CP&R to the total disbursements, you have to bring in not only electronic funds transfers, but tribal, transfers in from tribal. . ." Tr. 1431:13-17 (Scheuren).

Thus, in sum, because Defendants' analysis considered total collections and total disbursements, the actual percentage of collections associated with Tribal IIM is irrelevant to the outcome of the model. The percentage is only relevant with regard to the models presented by Professor Cornell and Dr. Palmer because neither included disbursements in the form of journal entries and BB transfers, and to the extent Tribal IIM funds and other funds were distributed in those forms rather than by check or electronic funds transfer, Plaintiffs' models have understated disbursements.

RESPONSE TO PLAINTIFFS' PROPOSED FINDINGS OF FACT

I. INDIVIDUAL INDIAN TRUST FUNDS

Plaintiffs begin their submission with several pages of commentary and background which do not form part of their proposed findings and conclusions of law and need no response here.[5] One opening statement, though, warrants a correction. Plaintiffs' statement that "the government's records of IIM receipts and disbursements were neither kept nor retained primarily at the individual or aggregate level in a systematic way," Plaintiffs' Proposed Findings of Fact and Conclusions of Law (Pl. PFFCOL) at 4 (emphasis added), is not true. Although, "for the most part, IIM records were not kept at the aggregate level," Tr. 784:14-15 (Angel), it is true that "[t]hese records literally begin at ground level and work their way up to the individual . . . ." Tr. 784:20-21 (Angel) (emphasis added); Defendants' Proposed Finding of Fact (Def. PFOF) 226.

A. Overview of Parties' Throughput Calculations

1. Defendants' Spreadsheets

a. AR-171

1. Contrary to Plaintiffs' proposed finding, AR-171 does not demonstrate that an imbalance existed between total collections and total disbursements in the IIM System. As the Court has already surmised, the apparent $3.6 billion difference is explained by the fact that AR-171 estimated total collections for a longer period (1909-2005) than it did for total disbursements (1972-2005). Cobell v. Kempthorne, 532 F. Supp. 2d 37, 83-

[5] To assist the Court, Defendants have organized their Response to Plaintiffs' Proposed Findings of Fact to correspond with the paragraph numbers designated by Plaintiffs. Lack of comment from Defendants on particular findings of fact or conclusions of law proposed by Plaintiffs should not be construed as Defendants' agreement with those particular proposed findings or conclusions.

84 (D.D.C. 2008) (Cobell XX). Plaintiffs, in their own calculations, acknowledge that disbursements did in fact occur over the entire history of the IIM System. See, e.g., PX-41 (Column F). Ms. Herman's revised table, DX-371, addresses this and other historical gaps in the AR-171 data. Tr. 538:1-546:5 (Herman).

b. Estimates of Accounting Coverage in DX-365

3. Plaintiffs' proposed findings with respect to DX-365 are not relevant. First, DX-365 related only to accounting coverage estimates and was not ever offered as a throughput "spreadsheet" as implied by Plaintiffs' heading for this proposed finding. Second, Plaintiffs now make assertions about DX-365, but they did not use or rely upon DX-365 for any purpose in their case-in-chief. In their rebuttal case, Plaintiffs' substitute expert, Dr. Palmer, tried to make use of the 77% figure noted at the bottom of DX-365, but he conceded he had no understanding what that percentage really represented. See, infra, Response to Pl. PFOF 41.

4. The tables in DX-365 were developed expressly for the October 2007 hearing, pursuant to the Court's requests, to show how much throughput would be covered by the historical accounting for individual IIM accounts given various assumptions concerning the characteristics of those accounts. Defendants prepared DX-365 on a compressed time schedule. See 2007 Tr. 1129:18-1130:10 (Haspel). The exhibit states that "Estimated Credits into IIM Accounts is Currently Estimated as 77% of Total Collections and is Subject to Change upon Further Analysis." DX-365 (stated at bottom of each page in bold lettering). Nothing in the exhibit or in the related trial testimony by Assistant Deputy Secretary Haspel, see 2007 Tr. 1110:14-1141:13 (10/17/07 PM) (Haspel),

suggests the other 23% of "total collections" indicates that any funds were mishandled, misdirected or lost. As the Court noted, Plaintiffs chose not to cross-examine Dr. Haspel on that point. Cobell XX, 532 F. Supp. 2d at 85. Nothing in the exhibit or related testimony indicates that the other 23% should have been deposited into individual IIM accounts.

During this trial, Ms. Herman testified that she did not use DX-365 in any of her computations and explained that the total collections figures in DX-365 are misleading because, although DX-365 deducts known Tribal IIM deposits for DX-365's collections figures, it did not exclude other non-Individual monies, such as other tribal funds or bid deposits. Tr. 489:22-492:11 (Herman).

c. The Revised AR-171 (now DX-371)

5. The testimony that Plaintiffs cite indicates that Ms. Herman had devoted about "98 percent" of her time since October 2007 working on all the "IIM trust issues" she testified about during this trial, not just the revision to the AR-171 table, as Plaintiffs assert. Tr. 587:1-8 (Herman).

7. Defendants note that Plaintiffs offered no evidence to dispute Ms. Herman's estimates of the Osage annuity payments that were actually deposited into individual IIM accounts, nor did they offer any alternate estimate of Ms. Herman's calculation of Tribal IIM. However, Dr. Angel provided IIM System balance information to Ms. Herman, information that was from official records, such as Investment Reports. Tr. 785:5-7; 798:13-17 (Angel).

8. Plaintiffs incorrectly describe some of the data used to prepare DX-371. For 1986

through1995, all data were taken directly from the IRMS system, not TFAS. See DX-372 at 00006 (explanation of Columns C-F). Although Plaintiffs imply that the FTI database Ms. Herman used to examine the IRMS data was somehow inferior, Ms. Herman made clear at trial that the IRMS data she had studied was an exact copy of what had been on the IRMS system when it was operational, plus data on restored transactions. Tr. 527:1-13 (Herman). Finally, although audited figures were used to calculate total collections and total disbursements for fiscal 1996 through 2007, IRMS and TFAS data were used to help derive the collections categories on DX-371 (Columns B, C, D, E & F). See DX-372 at 00006 (explanation of Columns C-F).

9. Defendants note that some undifferentiated interest, judgment and per capita collections, tribal monies, bid deposits and other collections are included in the "Other Receipts" totals. Tr. 472:20-22, 474:14-16, 475:11-476:12, 539:1-19, 541:4-7, 646:22-647:6 (Herman) ("There's many different types of monies that actually come into the IIM system."); DX-371 n.4.

10. Plaintiffs' proposed finding misconstrues the import of the $158.7 million balance difference. As Ms. Herman testified and no other testimony or evidence contradicts, the $158.7 balance difference is a difference between the calculated balances and the reported balances. Tr. 750:19-25 (Herman). The $158.7 million balance does not suggest that any money is missing or that the government is improperly withholding funds from class members. Tr. 751:1-4 (Herman). The only inference to be drawn from it is that additional information is needed to reconcile the two balance figures. Tr. 751:5-9 (Herman).

d. DX-461 and 462 - Dr. Scheuren's Multiple Imputation Model

11. Defendants note that, while Dr. Schueren did not use his model for the purpose of preparing annual estimates of collections and disbursements, his model made use of all available historical information as supplied by Morgan Angel and FTI. E.g., Tr. 942:12-21 (Schueren).

12. Despite Plaintiffs' unfounded assertions about the rare "vintage" of Multiple Imputation and so-called "considerable controversy among statisticians," the record demonstrates the contrary. Multiple Imputation is a statistical technique that has been endorsed by leading figures in the field of statistics, such as Professor Donald Rubin, the former chair of the Statistics Department at Harvard University. Tr. 931:16-932:3 (Scheuren).

Plaintiffs cite only a small portion of Dr. Scheuren's testimony to support their assertion that Multiple Imputation is the subject of "considerable controversy." Dr. Scheuren's full testimony and the article referenced in the transcript excerpts cited by Plaintiffs do not support Plaintiffs' assertion. The article itself states, at the outset, that "[i]mputation, the practice of 'filling in' missing data with plausible values, has long been recognized as an attractive approach to analyzing incomplete data." PX-137, at 1. The article continues, "[Multiple Imputation] is not the only principled method for handling missing values, nor is it necessarily the best for any given problem." Id. Indeed, Dr. Scheuren explained that "[i]f there is a problem with the multiple imputation in [Cobell], it doesn't affect our result except that we may have slightly overstated the uncertainty as a result of it" and that the significance of an overstatement of uncertainty is "[t]hat the amount of money that is at issue is larger." Tr. 1064:12-19 (Scheuren). Thus, if anything, Dr. Scheuren confirmed that the uncertainty conclusions of Multiple Imputation inure to the benefit of Plaintiffs.

14. Plaintiffs' proposed finding correctly notes that Dr. Scheuren's analysis used five variables: fiscal year, total collections, total disbursements, ending balance and Osage per share revenue. This implicitly acknowledges that Dr. Scheuren's model did not use or depend upon any estimates of Tribal IIM.

15. Dr. Schueren explained that the Multiple Imputation model was adjusted after initial efforts because the earlier model "had used the value in 1887 as if the trust started in 1887, which in fact in some senses it didn't." Tr. 1006:24-1007:1 (Scheuren).

17. Although Plaintiffs repeatedly assert that NORC's time-series modeling of data was "largely unexplained" and that there was "no explanation of this time series analysis," Dr. Scheuren provided a full explanation of the time-series approach. See Tr. 957:16-959:10 (describing seven-year time-series model). Plaintiffs' assertion that "even Dr. Scheuren was unable to explain any rationale for using the imputed data to help make adjustments to the reported data," finds no support in any of the eight pages of testimony that Plaintiffs cite. Id. (citing Tr. 1030:5-1037:12 (Scheuren)).

22. Plaintiffs' proposed findings about DX-371 misconstrue the inferences to be drawn from NORC's Multiple Imputation analysis. Dr. Scheuren explained that NORC's analysis did "suggest[] more data in this – more money in the system than the balance shown in the reports." Tr. 970:9-11 (Scheuren). Dr. Schueren noted, however, that based on NORC's analysis, one "cannot reject in our hypothesis that the data could be –

that the real data, if we had it all, would be consistent with the [$]423 million [balance as of 2007]." Tr. 970:21-24 (Scheuren). Dr. Scheuren confirmed that with a level of 97.5 % confidence, no more than $409.8 million was unexplained as a result of missing data, concluding, "Despite the weakness in this system and the length of time that these records have been produced, that's as bad as it gets." Tr. 975:23-976:3 (Scheuren).

2. Plaintiffs' Spreadsheets

a. Plaintiffs' Initial Benefit Conferred Model (PX-41)

23. Plaintiffs note that Professor Cornell's Attachment C computed a disbursement rate of 69.82%, but this calculation is substantially understated because the computation Plaintiffs' experts used overstated collections (the denominator) and understated disbursements (the numerator) in their calculated ratio, including:

- The percentage is based upon inflated collections (i.e., the inclusion of all Osage payments);
- It relies solely upon check disbursements and ignored all other forms of disbursement, such as EFTs and bookkeeping ("BB") transfers (see PX-56);
- It is based upon calendar years, not fiscal years; Tr. 1526:19-25 (Palmer)); and
- In deriving a percentage of paid checks at 93.75%, PX-56 (Column E), Plaintiffs took no account of the likelihood that uncashed checks would be small or trivial in dollar size. Tr. 311:5-11 (Cornell). Plaintiffs' failure to take account of this difference ignores record evidence from the October 2007 trial that unpaid checks are typically of small dollar values. See, infra, Response to Pl. PFOF 217-219 (discussing Treasury check study that found unpaid checks to be only 0.17% of

the dollar value under study and a later study by Interior which found that cancelled checks were only 0.2% of the total amount of checks issued).

24. Plaintiffs contend that Professor Cornell anticipated the government would produce additional historical information, but he ignored historical records that were already available to him. Plaintiffs' proposed finding and Professor Cornell's testimony confirm that the model presented in Plaintiffs' case-in-chief was preliminary and failed to use available data. Professor Cornell testified only about a methodology for determining an amount to be disgorged; he stated that further work was required before he could testify about the precise measure of the government's benefit. Tr. 324:9-21 (Cornell). For example:

- Professor Cornell failed to consider the effect of bid deposits in developing his disbursement rate, a fact confirmed in an exchange with the Court regarding DX-33. See Tr. 355:20-24 (Court notes that one-third difference in exhibit "would wipe out the delta") (discussing DX-33).
- Professor Cornell relied upon a 1926 collections figure but disregarded the 1926 disbursements amount reported in the same document, which the Court referred to as "buying half of this equation but not the other half." Tr. 292:16-17 (Court). Professor Cornell estimated that this omission resulted in an overstatement of "$734 million in terms of the bottom line in 2008." Tr. 306:10-18 (Cornell).
- Professor Cornell ignored disbursements data available in audited financial statements. Tr. 344:19-346:8 (Cornell) (discussing DX-438).

25. As this proposed finding confirms, Plaintiffs' erroneous treatment of Osage

headrights overstated their calculation of collections by approximately $883.4 million in nominal dollars. Both Professor Cornell and Dr. Palmer agreed that if Osage monies were disbursed directly from a tribal account to individual headright owners, without passing through an IIM trust account, those funds should not have been included in Plaintiffs' calculation of the amount to be disgorged. Tr. 334:7-23 (Cornell); Tr. 1577:13-16 (Palmer). Professor Cornell estimated that if his model improperly included Osage headright collections that never entered IIM trust accounts, the impact was approximately 20% of $58 billion, or in excess of $11 billion. Tr. 334:24-335:21 (Cornell).

Plaintiffs further assert that Professor Cornell "ensure[d] the model did not double count interest," but that is only partly true. Ms. Herman testified that the Interest column in AR-171 only reflected dollars expressly identified as interest collections within the IIM System; millions of dollars in undifferentiated interest was still included in "Other Receipts," which means that Plaintiffs' model still double-counted interest. Tr. 472:20-473:2 (Herman) ("Q: So if you ignore Column B, the interest column, in totaling up the collections, does that total still contain interest? A: It would contain some interest.").

26. Defendants note that Professor Cornell's derived 69.82% disbursement rate is contrary to the established historical record. His computation used only partial check information (see Pl. PFOF 199 & 201) and ignored EFTs, tribal funds transfers, and audited total disbursement figures in later years. As Ms. Herman noted by comparison, from 1972 through 2007, the annual disbursement range is 83% to 120%, Tr. 567:25-568:25 (Herman), with no year as low as the 69.82% used throughout Professor Cornell's

model. Tr. 568:21-24 (Herman).

27. Plaintiffs' proposed finding describes what Professor Cornell's analysis, PX-41, purported to calculate, but as demonstrated in Def. PFOFs 324-435, Professor Cornell's analysis is purely theoretical and disregards facts established both at the October 2007 trial and the June 2008 trial. Regardless of these serious deficiencies, however, Plaintiffs presented Dr. Palmer's rebuttal model as an "updated version of PX-41," Pl. PFOF 28, and as a result, this Court should not consider PX-41, except to the extent of assessing whether Plaintiffs met their legal burden of establishing a reasonable approximation of the amount to be disgorged as an element of their case-in-chief. See Def. PFFCOL at 34, 37-42.

b. Plaintiffs' Rebuttal Model

28. Plaintiffs' proposed finding oversimplifies the subjective and judgmental adjustments made by Dr. Palmer to Professor Cornell's model. See generally Def. PFOF 56-62, 69-91, 95-165, and 430-435.

29. Plaintiffs' proposed finding oversimplifies the nature of the adjustments made by Dr. Palmer to Professor Cornell's model to render disbursement figures. See Def. PFOF 60-62, 73-91, 95-102, 130-144. Plaintiffs do not make clear that Dr. Palmer only adjusted the revenue (PX-189-D at 1-2) and not the disbursement data from 1923-1949 (PX-189-F at 1-2; Tr. 1591:12-18, 1592:23-1593:1 (Palmer)). Plaintiffs offer no foundation to justify using the 77% figure appearing in DX-365 to adjust the 1923-1949 revenue figures upward. See Tr. 1589:23-25, 1590:1-17 (Palmer). Plaintiffs removed only some of the tribal money embedded in their 1915-1920 revenue data.

Moreover, Plaintiffs did not use actual check disbursement data as stated but used an estimate derived from summary tables provided by Treasury. See Pl. PFOF 199, 201. Plaintiffs settled for this estimate despite the fact that Plaintiffs had an opportunity, as early as January 2003, to have searches of the CP&R database performed at cost. See Defendants' Joint Response to Plaintiffs' Eighth Formal Request for Production of Documents at 14-15 (Jan. 23, 2003).

30. Dr. Palmer improperly adjusted data for 1923-1949 because he adjusted only for understated revenues, rather than also adjusting for understated disbursements. As Dr. Angel testified, the Sundry Civil Appropriation Act of 1906 "called on all branches of the federal government . . . to send to the Treasury department any receipt and disbursement information concerning money that did not enter the general Treasury of the United States." Tr. 790:7-11 (Angel) (emphasis added). Even a cursory review of those 1923-1949 receipts and disbursements reports shows reporting of both receipts and disbursements. See, e.g. , DX 27-00006; 00009 (showing IIM receipts and disbursements for 1932 and 1933, respectively); Tr. 790:19-791:21 (Angel). While it is true that these receipts and disbursements numbers for 1923-1945 under-report true totals because they address only funds held outside of Treasury, they under-report both receipts and disbursements, not just receipts. Def. PFOF 100; 266-268.

c. Plaintiffs' Specific Relief Model

31. Defendants oppose the Court's consideration of this "specific relief model," which was presented for the first time as part of Plaintiffs' rebuttal case.

B. Collections

1. 1887-1920

36. Rather than "suggest[ing]" that receipts data for 1915-1920 "may have" included direct pay, Pl. PFOF 36, Dr. Angel initially testified that such receipts data did include direct pay: "First of all, it appears that they've used revenues as synonymous with receipts, which they aren't because in certain instances we know monies are paid directly to individual Indians rather than hitting the system." Tr. 823:3-6 (Angel). Upon further review of the historical documents overnight, however, Tr. 919:20-920:8 (Angel), Dr. Angel confirmed that the 1915 report shown him by Plaintiffs' counsel did not contain any direct pay data. Tr. 919:24-920:1 (Angel). It is not true that he "was not sure of this one way or another . . . ." Pl. PFOF 36. In fact, after checking reports in his office, Dr. Angel confirmed that the 1912 and 1913 reports did include direct pay. Tr. 920:18-922:11 (Angel). Despite Plaintiffs' characterization, nowhere in his testimony did Dr. Angel refer to these as "modest direct payments." Pl. PFOF 36.

2. 1921-1951

37. Although Dr. Angel testified regarding "limited" data for 1922-1949, Tr. 787:24-25 (Angel), this was "receipt <u>and disbursement data</u>," Tr. 787:24-25 (Angel) (emphasis added), not "'limited' <u>collections</u> information," as misstated by Plaintiffs. Although Dr. Angel testified that "[t]here was no [ISSDA] report for 1945," Tr. 788:4 (Angel), Plaintiffs are incorrect in stating, "No information could be located for 1945." See DX-483 (showing receipt data, but not disbursement data, for 1945) citing DX-55 at 00004; DX-28 at 00003.

38. Although Dr. Angel testified that he had not seen a detailed account statement accompanying any of the 1922-1949 reports, he also added, "[B]ut that's not to say that one did not exist," Tr. 878:19-20 (Angel).

39. Plaintiffs' proposed finding focuses solely on the revenue side of the equation and fails to recognize that the understated nature of the referenced disbursing agent reports applies to the stated disbursement figures as well as to revenues. As described above in Response to PFOF 37 and 38, the understatement applies to both collections and disbursements.

40. While it is true that Dr. Angel conveyed 1922 receipts and disbursements data to NORC even though it was not "a realistic number based on everything else we saw," Tr. 876:19-21 (Angel), Dr. Angel also testified that "it was reported to NORC in particular as what they call an outlier as something that does not make sense." Tr. 877:4-5 (Angel); <u>see</u> DX-461 (NORC treasted 1922 data as outlier).

41. It is not true that, as Plaintiffs initially assert in this proposed finding, "[t]he data for this time period, between 1923 and 1949, were not available to plaintiffs prior to the testimony of Dr. Angel." All data referenced on Dr. Angel's Total IIM chart (DX-483) came from publicly accessible sources: "The information that comprises the total, the IIM chart, all but seven documents came from either National Archives, a library, a publicly accessible report. Seven of the reports are Bureau of Indian Affairs annual investment reports, and we gathered those at the American Indian records repository." Tr. 794:25-795:4 (Angel). Not only did Plaintiffs fail to access these publicly available records, they also did not follow the lead of tribal attorneys in conducting any research at

the American Indian Records Repository in Lenexa, Kansas (AIRR):

> Q: Do you know whether any attorneys ever visited the [AIRR]?
>
> A: Yes. We have worked with tribal attorneys. In fact, on one case, in a tribal trust case where we engaged in a collective document-gathering project. Now so saying, I should add that you need permission to go to [AIRR]. You have to request permission from the Office of Trust Records. But typically it's given and it's given without too much problem.

Tr. 795:7-13 (Angel). Moreover, six of the reports were exhibits during the October 2007 hearing. DX 27-00001; 00005; 00007; 00010; 00013; 00015.

While Dr. Palmer subsequently considered this data and chose to apply the 77% figure in DX-365 to adjust collections for 1923-1949, he plainly had no understanding of what DX-365 was intended to show, inasmuch as he could not explain the meaning of the captions "Proven by Transaction Reconciliation Testing and Interest Recalculation," "Proven by DCV Only," or "Proven Coverage" appearing on that exhibit. Tr. 1580:10-1581:6 (Palmer).

Dr. Palmer's use of the 77% figure in DX-365 was based on his erroneous conclusion that the exhibit's reference to "Estimated Credits Into IIM Accounts" represented a conclusion that the collections for 1923-1949 were understated. Tr:1581:7-23 (Palmer).

Dr. Palmer's decision to only adjust the 1923-1949 collections data downward was arbitrary and unjustified inasmuch as he disregarded Dr. Angel's testimony which referred to the understatement of disbursements in those years, as well as the understatement of receipts. Tr. 1585:12-1586:24 (Palmer).

42. Plaintiffs have mischaracterized Dr. Scheuren's testimony because, contrary to

their assertion, he did not testify that he "did not know that the revenues for 1923-1949 were understated." A fair reading of his testimony confirms that NORC "did not expect to model any bias in the data," Tr. 1024:25-1025:1 (Scheuren), because, unlike Dr. Palmer, NORC recognized that both collections and disbursements data was understated during that period and that the understatement of both did not affect NORC's conclusion, which addressed the balance calculated (collections less disbursements) as of 2007.

NORC was aware of the understatement of the collections and disbursements data because, when transferring the data to NORC, Morgan Angel conveyed not just the data itself, but also its limitations:

> Q: Now, you just mentioned some of the limitations of the new data. Did you convey any of these limitations to anyone?
>
> A: Oh, definitely. I conveyed them to both FTI and NORC. We had lengthy discussions about this and they certainly were clear in my mind about the limitations of the data that I presented . . . .

Tr. 792:23-793:3 (Angel); Def. PFOF 227.

Unlike the models proffered by Professor Cornell and Dr. Palmer, the NORC analysis did measure uncertainty in the data for 1923-1949. Tr. 1024:24-25 (Scheuren).

43. Plaintiffs' conclusion that Dr. Palmer reasonably adjusted "revenue amounts" for 1923-1949 is contrary to actual reported data for both collections and disbursements which, consistent with Dr. Scheuren's testimony, did not justify an adjustment process that was asymmetric. See Tr. 1025:6-1026:2 (Scheuren).

Plaintiffs' conclusion that Dr. Palmer reasonably adjusted "revenue amounts" for 1923-1949 is without foundation given his complete lack of understanding as to the nature of DX-365 or the 77% "coverage" figure contained in the exhibit.

3. 1951-1971

45. While "[b]oth parties used the same historical documentation for revenues in 1955," Plaintiffs neglected to use corresponding disbursement data for that same year contained in the same report. Although Plaintiffs attempt to justify this, Pl. PFOF 41 ("'reasonable to adjust the revenues and not the disbursements'"), this cherry-picking of data amounts to "buying one half of the equation but not the other half." Tr. 292:16-17 (Court). Def. PFOF 167. "Essentially if you're going to use one you've got to use both. You've at least got to show what the second number was, the disbursement figure in this case." Tr. 821:11-13 (Angel); Def. PFOF 171.

46. Dr. Angel did not "concede[] that this audit report [DX-72] reflected revenue of the IIM trust totaling $121 million in 1968."

4. 1972-1985

49. Although Plaintiffs used some data from AR-171, they did so incorrectly. They deducted the Interest break-out column in AR-171 from their total collections number, but they still "double counted" interest that remained undifferentiated within the "Other Receipts" category as part of their total collections. Tr. 472:20-473:2 (Herman) ("Q. So if you ignore Column B, the interest column, in totaling up the collections, does that total still contain interest? A. It would contain some interest.").

Plaintiffs claim there was "strong evidence" that revenues for 1972 to 1985 were "significantly under reported" but fail to cite anything in the record that supports the assertion. It is conjecture.

Plaintiffs suggest that Ms. Herman made inappropriate deductions to collections, but the record demonstrates the opposite. Ms. Herman reclassified entries in the computer records for this period that had originally been misidentified as new revenues; the entries were, in fact, opening balances reflecting existing deposits in the computer system, as Interior's agencies migrated to IRMS during this time frame. Tr. 719:20-720:25 (Herman). Ms. Herman testified how and why this type of double-counting error was being detected and then corrected. Tr. 747:3-18 (Herman) (without a correction, "you would be overstating the total collections."). Plaintiffs complain about adjustments made to the collections figures, but ignore that many of these may have corresponding adjustments on the disbursements side, too. See Tr. 747:3-18 (Herman).

Finally, Plaintiffs misconstrue Ms. Herman's cross-examination testimony. Ms. Herman did not testify that she had no "documentary support" for her adjustments. She actually testified that her work involved "potentially tens of thousands of transactions" that had been re-keyed from paper ledgers. Tr. 719:1-5 (Herman). Rather than reproduce all that data, Ms. Herman provided summary schedules disclosing the adjustments in DX-372, her binder supporting the figures in table DX-371. Tr. 718:21-25 (Herman).

50. As in the immediately preceding proposed finding, Plaintiffs again claim that "revenues for this period were, if anything, understated," and again they cite no evidence at all to substantiate their claim. They point only to Paper Ledger Era reconstruction work that is still underway, but fail to show how any of that work results in the "under reporting" of collections. Moreover, by focusing solely on the collections side of the Paper Ledger Era transactions, they grossly overstate the significance of any issue, because they have taken no account of corresponding adjustments that may also be made

on the disbursements side. See Tr. 747:3-18 (Herman).

51. For a fourteen-year period, and transactions covering as many as eighty-eight area or agency offices, Tr. 616:20-23 (Herman), Plaintiffs inquired about three instances where disbursements were reported for an office without a corresponding collections report for that same period and offices. Ms. Herman testified that she could not tell if this indicated under reporting of collections by just “looking at these two schedules,” Tr. 613:11 (Herman), but that “[w]e looked at other investment reports, for instance, that were available during this time frame, and in terms of the balance data it was very consistent with the information that had been located from the GLDL.” Tr. 613:14-17 (Herman).

52. Plaintiffs’ table in this proposed finding is misleading. The data on this table purportedly is derived from DX-372, pages 116-118, but Plaintiffs significantly undercount the number of agencies that reported data by excluding any agency that reported zero dollars in transactions. As Ms. Herman explained on cross-examination:

> Q. And I notice that when I look at [DX-372, pages 116-118], there are times that there’s nothing there and it’s just blank?
>
> A. The dash line indicates a zero.
>
> Q. And the blank line indicates a zero also?
>
> A. No. The blank line indicates no data.
>
> Q. All right. So the dash line means there was data but it just adds up to zero?
>
> A. That’s correct.

Tr. 609:25-610:8 (Herman). If Plaintiffs had included the agencies with dashed lines shown for the collections, the table in this proposed finding would show data from forty-four agencies in 1972, fifty-one in 1978, and fifty-eight in 1982. See DX-372, pages 116-118 (total number of agencies for each year reporting data). Thus, Plaintiffs' table simply ignores the explanation provided by Ms. Herman in response to questions from Plaintiffs' counsel.

In addition, the table contains an apparent typographical error. The collections amount for 1982 revenues is $603.7 million, rather than $608 million, as reflected in the table. See DX-372, page 118 (total for 1982).

Finally, by focusing solely on the collections side of Paper Ledger Era transactions, Plaintiffs grossly overstate the significance of any issue, because they have taken no account of corresponding adjustments that may also be made on the disbursements side. See Tr. 747:3-18 (Herman).

53. Plaintiffs offer innuendo but no evidence to demonstrate that the reported data were incorrect or understated. Although there was estimation, there was no evidence of under reporting of revenues from 1972-1985. Dr. Schueren testified that estimates of the type made by CD&L were an acceptable approach. Tr. 959:25-960:2 (Scheuren) (estimating approach comparable to what Dr. Scheuren has done in other settings). And, as demonstrated above, see supra Response to Pl. PFOF 49, Ms. Herman made no "undocumented" deductions of any sort; her efforts went solely to the elimination of double-counting of existing balances as "new" receipts. Tr. 747:3-18 (Herman) (without a correction, "you would be double counting the total collections over time").

54. Plaintiffs repeat their unjustified assertion that there was a "lack of support" for

"Ms. Herman's deductions." As Ms. Herman testified, the $19.75 million in adjustments referenced in her testimony was the result of "potentially tens of thousands of transactions," Tr. 719:5-6 (Herman), and that was the reason the number appeared as a summary amount in DX-372, rather than appearing as a "separate schedule," see Tr. 718:21-25 (Herman). Once again, no basis exists for Plaintiffs' speculation that there was "overall under reporting [of] collections during the period."

5. 1986-1995

55. Plaintiffs create a false comparison between the earlier table, AR-171, and Ms. Herman's estimates for this trial, DX-371, and disingenuously suggest that her testimony is not credible because DX-371 revised collections figures that had appeared on AR-171. Plaintiffs plainly ignore what the Court readily understood in its January 30, 2008 opinion: that AR-171 was just an estimate based upon on-going historical investigation and forensic accounting work. See Cobell XX, 532 F. Supp. 2d at 83-84 (discussing AR-171's figures as estimates and recognizing it as a "starting point" in assessing throughput). Indeed, the Court expressly urged the government to provide a revision to AR-171 for this trial. Status Hearing Tr. 98:23-24 (Apr. 28, 2008); see also Order of May 2, 2008 [Dkt. No. 3526] at 2, ¶2 (inviting updated tables). Despite their complaint that collections during the referenced period were reduced by $243.3 million, they are forced to concede in a footnote that the same series of adjustments also reduced *disbursements* by $225.5 million, leaving a net change of only $17.8 million. See Pl. PFOF 55 n.6. Plaintiffs' adherence to outdated, incomplete estimates in AR-171 and their refusal to incorporate the updated calculations in DX-371, demonstrates that their

approximations are not reasonable.

56. Plaintiffs here repeat their complaint about $243.3 million in adjustments to revenues after just conceding in a footnote that, when corresponding adjustments to disbursements are also considered, the overall impact on throughput is only $17.8 million. See supra Response to Pl. PFOF 55. As Ms. Herman testified, the effort to eliminate internal transfers from the throughput estimation will result in similar, corresponding changes to both revenues and disbursements. Tr. 746:4-747:2 (Herman).

57. Plaintiffs' proposed finding that Ms. Herman made "[a]nother major deduction from the revenue from 1986-1995" is completely wrong. All Ms. Herman did in the referenced calculations was move money from one category of collections to another collections category. Having since located more specific interest information, she moved dollars that had been included under "Other Receipts" in AR-171 to the "Interest" column of DX-371. The reclassification had no effect on total collections. Tr. 723:1-724:13 (Herman); see also DX-372 at 00030-31 (IRMS/TFAS schedule).

58. Plaintiffs, again, repeat their unjustified and unsubstantiated claims that Ms. Herman's deductions were unsupported. See supra Response to Pl. PFOF 49-57. Moreover, support for the deductions was found in the DCV work, which Dr. Palmer openly admitted he knew nothing about. For example, when he was asked about the meaning of "Proven by DCV Only" in DX-365, Dr. Palmer's response was simply "Again, I know no more than it says there." Tr. 1580:18-20 (Palmer). Indeed, Dr. Palmer did not even know what the "D" or "C" referred to in the term "DCV." Tr. 1580:21-23 (Palmer), and when asked whether he reviewed any of the DCV materials, he answered,

"I had seen some materials early on. I'm not exactly sure." Tr. 1580:24-25 (Palmer). Plaintiffs' reliance on initial estimates in AR-171 and refusal to include the more accurate calculations reflected in DX-371 demonstrates that their approximations are not reasonable.

6. 1996-2007

C. Proceeds of the Osage Mineral Estate

60. Plaintiffs assert as uncontradicted fact that, prior to disbursement, funds from the Osage Annuity account are transferred to an IIM special deposit account (SDA), but the assertion is not only contradicted but disproved by overwhelming evidence and representations by the Osage Nation. Plaintiffs' only support is a brief statement by Mona Infield in October 2007. Her conclusory testimony, though, was rebutted by Ms. Herman during that same trial. When asked by the Court "whether these Osage Quarterly Annuity payments pass through BIA or Treasury at all?," Ms. Herman testified, "They are credited into the tribal trust, not into the individual trust initially." 2007 Tr. 658:25-659:3 (Herman). As Ms. Herman has devoted most of her entire professional career to the study of the IIM accounts, her understanding is more credible.

Evidence adduced at the June trial further refutes Plaintiffs' assertion. Contemporaneous accounting documents contained in Ms. Herman's work papers establish that disbursements came from a "Tribal" account and not an "IIM" account. See DX-372 at 0027-02122. For example, one set of papers for September 2000 indicate the disbursements came directly from an account called "OSAGE TRIBE," identified as "PL7386706," and not a Special Deposit Account within the IIM System. E.g., DX-372-

2009, 2028-29, 2031, and 2033; see also Tr. 663:14-664:2 (Herman).

Moreover, Ms. Herman's testimony is confirmed – and Ms. Infield's is refuted – by the Osage Nation in the Tribe's own proposed findings and conclusions. See The Osage Nation's Proposed Findings of Fact and Conclusions of Law at 2 (July 12, 2008) [Dkt. No. 3551] (Osage Nation PFOF) ("Historically, the distribution has occurred in one of two ways . . . by public voucher, whereby funds are taken out of the Osage tribal account and are set aside . . . for checks . . . cut to headright owners[;] . . . the other method of distribution is . . . transfer[] out of the Osage tribal account and into separate . . . IIM accounts").

61. According to Intervener Osage Nation's official web site,[6] approximately 25% of the Osage headrights are currently owned by non-Osage, including Indians of other tribes, non-Indians, corporations, churches, and others. See also Tr. 163:10-17 (Infield) (headrights are owned by non-Indians, some charity organizations, and some faith-based organizations that have inherited shares of the headrights over the years).

62. Plaintiffs' assertion that Ms. Infield "confirmed the understanding of employees and others at the Osage Agency, including tribal officials, that the headright owners owned the funds in the Osage Annuity Account" is incorrect. Ms. Infield's hearsay testimony as to what others at the Osage Agency may believe or understand constitutes nothing more than unsupported speculation. Plaintiffs did not demonstrate that she was

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[6] Osage Nation Mineral Council, "Frequently Asked Questions and Answers About the Osage Mineral Estate" (FAQ) (http://www.osagetribe.com/mineral/info_sub_page.aspx?subpage_id=6) (July 17, 2008).

in a position to represent the views of tribal officials or employees at the Osage Agency. Moreover, the understanding of employees and others at the Osage Agency regarding who owns the funds in the Osage Annuity Account are irrelevant to this legal issue.

Her testimony is also directly contested by the Intervener Osage Nation. As the Tribe states in its recent filing, "Plaintiffs . . . erroneously argue[] . . . that the funds . . . credited to the Osage tribal trust account are individual Indian monies at the time of deposit. [However] . . . , funds credited to the Osage tribal account are <u>tribal funds</u> when deposited and while they remain in the account." <u>See</u> Osage Nation PFOF at 3 (emphasis added).

63. This proposed "finding," as Plaintiffs concede, is really a proposed conclusion of law which is inappropriate here. Plaintiffs' assertion that it should not matter whether Osage headright payments were ever destined for deposit into any individual's IIM trust accounts is curious, given the focus of this case on accounting for transactions involving individual IIM accounts. <u>See</u> <u>Cobell v. Babbitt</u>, 30 F. Supp. 2d 24, 39-40 (D.D.C. 1998) (retrospective allegations of the complaint seek solely an accounting of money existing in IIM accounts). Plaintiffs have not even made an effort to show that all Osage payments actually belong – as a matter of fact – to class members. The evidence of record is to the contrary. The class includes certain IIM account holders, not all Indians. <u>See</u> Order of Feb. 4, 1997 [Dkt. 27]. Plaintiffs' own witness, Ms. Infield, noted ownership interests held by non-Indians, corporations, churches, and others. Tr. 163:10-17 (Infield). <u>See</u> <u>supra</u> Response to Pl. PFOF 61.

Plaintiffs' assertions also defy the plain language in the accounting records prepared for the Osage headright payments, which Dr. Palmer did not recognize. Tr. 1560:2-6 (Palmer) (when asked if he recognized the "types of documents" contained in DX-372-2-25-2054, he responded, "They don't seem familiar. I may have reviewed something similar to it, but they don't . . . .") (ellipsis in transcript).

As demonstrated during Dr. Palmer's cross-examination, Tr. 1560:19-1573:10 (Palmer):

- The disbursements were shown on accounting documents as coming from a "Tribal" account and not an "IIM" account, e.g., DX-372-2026 and -2030 (September 2000 payments);
- The disbursements came out of an account called "OSAGE TRIBE," identified as "PL7386706," e.g., DX-372-2028, -2029, -2031, and -2033; and
- Disbursements made through bookkeeping transfers – "BB transfers" – simply transferred from the Osage Tribe fund to IIM "6039" fund accounts, while disbursements directly to annuitants were made by checks authorized by "Public Voucher" forms, e.g., compare DX-372-2029 with DX-372-2033.

Both Professor Cornell and Dr. Palmer agreed that if Osage headright payments were made directly to annuitants from the Osage Tribal account, without going into the IIM trust accounts, those amounts should have been excluded from Plaintiffs' models. Tr. 334:7-23 (Cornell); Tr. 1577:13-16 (Palmer).

Moreover, Plaintiffs mischaracterize Dr. Angel's testimony in stating that he "conceded [that] . . . it does not make a difference where the disbursing agent placed the funds or the account for which they were designated . . . ." Although Dr. Angel testified that the label "Individual Indian money" did not change regardless of where the funds were, he clearly did not mean that all "those funds belong to individual Indians."

> Q: It didn't make a difference where the government put that money . . . , it was still considered Indian money; is that correct?
>
> A: That's the definition here, but we do know that money is coming into the system, is being collected in the system that does not go to individual account holders.

Tr. 837:11-17 (Angel). Regardless of how "defendants have elected to categorize the trust funds," clearly not all such funds constitute "trust income held for Individual Indians." See Def. PFOF 94 (cemetery funds, student activity funds, CCC wages, etc.); Tr. 837:11-17 (Angel) ("Well, tribal IIM, the bid money that entered the system and subsequently left the system, some of the administrative fees; issues like that.").

64. Plaintiffs contend that "all individual Indian headright shareholders are part of the plaintiff-class." This contention is contradicted by both the terms of the class certification order in this case and the Osage Nation itself. The class clearly does not include all Indians but only "present and former beneficiaries of Individual Indian Money accounts . . . ." Order of Feb. 4, 1997 (emphasis added).

According to Intervener Osage Nation's own web site, see supra note 6, while some Osage having headright interests also have IIM accounts, not all do. In response to the frequently asked question (FAQ), "Does every Osage headright holder have an IIM account?," the Osage Nation advises: "No. There are Osage tribal members with headright interests who do not have IIM accounts." If an Osage headright owner without an IIM account wishes to have one, the Osage Nation provides this advice: "The Superintendent of the Osage Agency has discretion to revoke the competency status of any Osage individual, regardless of blood quantum, and qualify the individual to receive an IIM account" (emphasis added). It is this limited category of holders of IIM accounts who may qualify as members of the plaintiff class, that is included in Defendants' computation.

Finally, Plaintiffs misrepresent Defendants' calculations of total collections as reflected in DX-371. If any tribal money – from any tribe (Osage or otherwise) – was credited into an IIM special deposit account, a Tribal IIM account, or directly into any individual IIM account historically, those receipts have been counted as part of total collections on DX-371. See Tr. 663:14-664:2 (Herman). The Osage annuity payments are entirely different in character because a large portion of those funds, historically, have been paid directly out of the tribal account. See Osage Nation PFOF at 2 ("Historically, . . . [some annuity] funds are taken out of the Osage tribal account and are set aside . . . for checks . . . cut to headright owners.").

65. Plaintiffs err in asserting that "Dr. Angel's sole criticism of plaintiffs' model as it related to Osage revenue was its assumption that there existed 2,229 headright interests prior to 1906." Immediately after testifying that "[o]ne of the problems I saw with their analysis of the Osage payment is that as they looked at annuity payments . . . prior to 1908 they used the multiplier of 2,229 Osage," Tr. 816:20-23 (Angel), Dr. Angel added, "Also prior to 1908 we know . . . that at times much of the money was paid directly to individual Osage Indians rather than going through the individual Indian money account system." Tr. 817:1-5 (Angel). Dr. Angel thus did not limit his criticism of Plaintiffs' model regarding Osage to the headright-number issue.

66. Dr. Palmer's analysis of Osage headrights for 1887-1906, using straight-line interpolation, disregarded a reported population figure of 1,496 for 1889 and, as a result, overstated headrights using his estimate of 1,708 headright shares for that year. Tr. 1556:9-1557:13 (Palmer); DX-484.

When this oversight was brought to his attention, Dr. Palmer did not correct his model but, instead, reaffirmed the preliminary nature of his model, noting that "if there's better information, obviously I'm happy to use it and incorporate it." Tr. 1557:9-16 (Palmer).

69. Contrary to Plaintiffs' assertion, the revenue data they used to calculate Osage headright distributions has been disputed. Ms. Herman found significant mistakes in the website calculations. As is explained in Ms. Herman's work papers, the website data switches from fiscal year to calendar year and duplicates some payments while excluding others. Thus, she used the website for only part of the time frame (see DX-372 at 00206) and relied on an Osage Tribal Report covering January 1880 through December 1975 (see DX-372 at 00199-204). Ms. Herman noted these differences in her table beginning in DX-372 at 00165 ("Comments" column).

Plaintiffs also made a significant $15.7 million error in their use of the Osage data for 2007. Plaintiffs' Osage annuity total for fiscal year 2007 erroneously includes receipts from fiscal year 2008. The quarterly payments for the Osage headrights total as follows:

Period	Amount
March 2007	$13,764,075
June 2007	12,359,805

September 2007	14,477,355
December 2007	15,681,015
Total	$56,282,250

The calendar year total for 2007 ($56,282,250) exactly matches Plaintiffs' fiscal year number. Compare PX-189-E at 3 (Plaintiffs' 2007 figure) with DX-372 at 00174 (March-Sept. 2007 payments); DX0372 at 00206 (Dec. 2007 payment of $7,035 per share x 2,229 shares = $15,681,015); DX-372 at 00174. Thus, Plaintiffs' Osage annuity calculation is overstated by at least $15,681,015.

D. Defendants Have Established that 10-15% of IIM from 1934 to 1985 Was Tribal IIM

70. Plaintiffs misstate how Ms. Herman calculated Osage annuity collections. She identified all of the Osage money that came into the IIM System, not only that which was credited to an individual's IIM account. Tr. 539:20-540:19 (Herman); see also id. 743:5-18 (Herman) (describing as collections transfers from tribal accounts into IIM System generally). On the disbursement side, she counted disbursements of any dollars that had entered the IIM System, including those by check (cf. Tr. 540:14-19 (Herman)); she properly excluded, however, checks paid directly from the Osage tribal account.

71. Plaintiffs exaggerate Dr. Angel's testimony in asserting that he stated that "auditors repeatedly objected to . . . inclusion [of tribal IIM] with IIM." Although many of the audit reports stated that Tribal IIM is "in there but . . . shouldn't be," Tr. 846:2-4 (Angel), Dr. Angel also emphasized that this was recognized as how the system worked. Tr. 845:25-846:1 (Angel) ("However, it's recognized in the audit reports, it's recognized

in the annual investment reports, that this is part of the system.”)[7]

72. Contrary to Plaintiffs’ assertions, DX-371 indicates $900,000 of new collections of Tribal IIM in the most recent fiscal year, 2007, DX-371 at 2 (Column E, 2007), and Plaintiffs offer no evidence that all Tribal IIM is gone from the system. They also ignore the millions of dollars in other tribal funds that Ms. Herman demonstrated were in the IIM System over time. Plaintiffs try to have it both ways, by contending here that all Tribal IIM has been disbursed, while asserting in their own model that some 31% of all receipts in any year never got disbursed. See, e.g., Tr. 340:23-341:11 (Cornell).

73. Plaintiffs’ contention that Defendants sought “to remove Tribal IIM from their calculation” is patently wrong; record evidence conclusively establishes that Defendants’ calculation of total collections and total disbursements counts all tribal money transferred into the IIM System, including all Tribal IIM. Ms. Herman testified at length about fund flows historically, and expressly counted Tribal IIM as part of total collections. See DX-370; DX-371 (Columns E (Tribal IIM) and G (Total Collections); Tr. 541:8-9 (Herman) (Column G “sums Columns B through F”). She also presented multiple examples of other tribal funds that happen to be in the IIM System, after explaining the practical need to compare total collections and total disbursements:

> Q. Based on your study of the accounts, are you able to isolate all of the total collections that are just related to individual Indian accounts?
>
> [Ms. Herman:] It's very difficult to do, so in our analysis we considered all of the collections into the system.

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[7] Dr. Angel also acknowledged that there was, “particularly by the 70's and 80's, an effort to move tribal IIM out of the IIM system.” Tr. 845:23-24 (Angel).

> Q. Okay. So when you're studying the flows of funds through the system, what did you wind up doing? What was the next best approach?
>
> A. We considered all of the collections into the system, not only those collections that went to individual accounts.
>
> Q. And how about on the disbursement side?
>
> A. Again, we considered all of the disbursements from the system.

Tr. 502:3-15 (Herman); see also id. 541:16-542:4 (Herman). Dr. Angel's cited testimony implies nothing to the contrary. It addresses only Plaintiffs' model. Tr. 820:18-21 (Angel).

74. The figures Plaintiffs cite for Defendants' calculation of Tribal IIM on DX-371 are generally correct, but they are immaterial because all Tribal IIM is counted toward total collections. See supra Response to Pl. PFOF 73 and Response to Court's Notice to the Parties.

75. Plaintiffs err in asserting that "[n]o backup documentation whatsoever was provided to support Dr. Angel's estimate of Tribal IIM . . . ." Dr. Angel testified in detail regarding the documents he reviewed in making his estimation, Tr. 842:7-22 (Angel) and numerous documents within the record establish the reasonableness of his estimate. See Def. PFOF 63-68. These documents show nationwide figures as high as 21%, Def. PFOF 64, and agency percentages as high as 68%, Def. PFOF 64. Although Dr. Angel did not describe each of these exhibits in detail during his testimony, he described for the Court the types of documents he relied upon in arriving at his 10%-15% estimate, Def. PFOF 63, and those documents are uncontroverted historical evidence that support his estimate.

See, e.g., DX-26 at 00002, 00007; DX 485 at 00001-00003; DX-486 at 00001; DX-487 at 00003-00004; DX-76-00012. Other evidence corroborates his estimate. For example, actual account figures for 1986-1989 reflect Tribal IIM as ranging from 16% to over 26% of total collections. See DX-372 at 00004 (dividing Column E by Column G in each year, 1986-89).

77. Plaintiffs exaggerate in stating that "auditors determined that substantial individual Indian monies, including per capita payments, were commingled by Interior with funds designated as Tribal IIM." (Emphasis added.) Through Dr. Angel's cited testimony, Plaintiffs adduced one instance at one agency in which over half of the tribal IIM consisted solely of per capita payments. Tr. 850:3-851:14 (Angel). It is a distinction without a difference in any event, because Defendants counted all Tribal IIM money as part of total collections. See supra Response to Pl. PFOF 73-74.

80. Plaintiffs wrongly claim that "Dr. Angel's calculation of Tribal IIM was wholly unsupported and speculative," and that "there was absolutely no support available for defendants' estimates of Tribal IIM." Many exhibits evidencing Tribal IIM were introduced both in the October 2007 trial and in the June 2008 trial. See generally Def. PFOF 64-67. Likewise, Plaintiffs' claim that Dr. Angel's 10%-15% estimate is "inflated," is belied by exhibits showing nationwide figures as high as 21%, Def. PFOF 64, and agency percentages as high as 68%. Def. PFOF 64. Actual account figures for 1986-1989 reflect Tribal IIM as ranging from 16% to over 26% of total collections. See DX-372 at 00004 (dividing Column E by Column G in each year, 1986-89).

81. Again, Plaintiffs contend that Defendants reduced their "IIM collections" by

deducting Tribal IIM, when the record conclusively establishes the opposite. See supra Response to Pl. PFOF 73-74.

82. Plaintiffs' proposed finding that Tribal IIM is not relevant to Plaintiffs' own calculation is unsupported. Plaintiffs' models include total collections from AR-171, which in turn includes all tribal money within the system. Because Dr. Palmer relied on AR-171 collections amounts in calculating the various disbursement rates applied in Plaintiffs' rebuttal model, his disbursements rates are necessarily understated because those collections include Tribal IIM, while his disbursements analyses omitted BB transfers, which include transfers of Tribal IIM monies out of the IIM System. E.g., Tr. 1472:15-1473:1 (Palmer); Tr. 1551:18-20 (Palmer); 1554:10-18 (Palmer); 1633:10-13 (Palmer); DX-481 (BB transfer of Tribal IIM money from IIM System to tribal trust account); see Tr. 1633:17-1634:23 (Court notes that Dr. Palmer's analysis includes all receipts but only recognizes check and electronic transfers as disbursements, observing "That may be where the 34 percent [difference in Dr. Palmer's analysis] comes in."). Moreover, Plaintiffs' bald assertion that no tribal money exists in the IIM System today is refuted by strong evidence to the contrary. See supra Response to Pl. PFOF 72.

E. Disbursements

1. Plaintiffs' claims about restricted payments to Indians

83-87. Despite Plaintiffs' citations concerning policies that may have been in place during the early twentieth century for the protection of Indians, it is remarkable that, despite the "300 audits of the IIM accounting system" that Plaintiffs assert were performed over the years, Plaintiffs offered no evidence that any money continued to be withheld over time.

2. Evidence at trial

89-91. Plaintiffs are incorrect in arguing that trial evidence establishes that IIM funds were not distributed to beneficiaries. Pl. PFOF 88-91. Despite Plaintiffs' claim to the contrary, Dr. Angel never "acknowledged that, according to the audits, trust funds, as a matter of practice, were improperly withheld from individual Indian beneficiaries." Pl. PFOF 89 (emphasis added). Dr. Angel agreed with Plaintiffs' counsel that "[t]here have been audits that have talked about" "money intended for beneficiaries wasn't going to them." Tr. 916:25-917:3 (Angel). He did not "acknowledge" that, trust funds, as a matter of practice, were improperly withheld from individual Indian beneficiaries. He was shown but one example and agreed with Plaintiffs's counsel that "[t]his would be one example . . . where trust funds were intended for beneficiaries, but for whatever reason they were not being distributed." Tr. 917:24-918:3 (Angel) (emphasis added). One example manifestly is not "a matter of practice."

Plaintiffs' citations to PX-65, their "Compendium," Pl. PFOF 90-91, do not prove otherwise. First, the Court recognized the questionable probative value of selected critical quotations from historical documents. Tr. 418:17-20 (the Court) ("I'm not sure what portion of this bears to the whole, but it strikes me as a slightly off-kilter example of what you're talking about."); Tr. 428:15-19 (the Court) ("[R]estraining themselves from making payments in later years doesn't mean - doesn't affect the disbursement schedules. It may affect the policy by which the schedules are made, but I don't see how it impacts the legitimacy of the disbursement numbers."). Second, as the cross-examination of Mr. Pallais revealed, Plaintiffs' Compendium often took the quoted statements out of context. See generally Tr. 435:12-443:12 (Pallais). Third, nothing in the selective Compendium quotes actually disputes the veracity of specific data used by Defendants in their aggregate calculations. Mr. Pallais' testimony, for example, concerning whether specific individuals received proper amounts, says nothing about whether overall aggregate disbursements were computed correctly. As Dr. Angel noted in concluding his direct examination:

> Many of the documents that are cited to in the 73-page compendium I believe came from my records collection, so I'm very well aware of the audit reports, the problems that were found with IIM over the course of the years. Generally speaking, despite this, I think that the records are reliable, that they do present us with our best data to understanding individual Indian monies.

Tr. 825:8-14 (Angel). Fourth, although Mr. Pallais testified in great detail regarding his perception of the unreliability of government disbursement data, the June trial was the first time he had drawn a distinction between the reliability of disbursement records and the reliability of receipt records, despite having testified at length in October, 2007. Def. PFOF 170.

Finally, Plaintiffs' attack on disbursement calculations improperly presumes that beneficiaries had no way over the years to challenge errors in disbursements. To the contrary, all beneficiaries have had the right to file claims if they believed a check had been improperly issued against their account or fraudulently negotiated. See, e.g., AR-008, at 33 (Accounting Standards Manual, Appendix Reference 2.1.5.1-2.1.5.4, discussing FMS-3858, the claim form to inform Treasury that a check was not appropriately negotiated). A more reasonable deduction is that had large amounts of disbursements gone missing, they would have been reported long ago. As the Court observed during trial, "If money is lost through waste, fraud, and abuse, the government doesn't have the benefit of it, and there may be a damages claim for it, but I don't think there's an equitable benefit to the government claim for it." Tr. 686:1-4 (Court).

92. Dr. Palmer's analysis of CP&R data, which Plaintiffs characterize as having "confirmed" a disparity of 25.5% between collections and disbursements, is grossly inaccurate. The evidence clearly demonstrated that his disbursement rate calculations, such as the 74.5% rate set forth in PX-189-C, failed to consider disbursements other than those made by check or electronic transfer. <u>See</u> Def. PFOF 108-129; <u>see</u> <u>also</u> Tr. 1633:17-1634:23 (Court notes that Dr. Palmer's analysis includes all receipts but only recognizes check and electronic transfers as disbursements, observing "That may be where the 34 percent [difference in Dr. Palmer's Attachment C] comes in."); <u>see</u> <u>also</u> DX-236 at 1-2 (showing FY99 total disbursements of $336.6 million consistent with DX-371 and AR-171, including "BB" and other inter- and intra-fund transfers of $134.6 million, or 40%); DX-238 at 1. It is also clear that Dr. Palmer did not even review the actual CP&R data but based his entire disbursement estimate on summary estimates he found on tables in a Treasury memorandum. <u>See</u> Pl. PFOF 199, 201.

3. Defendants' evidence of disbursements

93-94. Asserting that "[n]o witness testifying for the defendants identified any funds that were collected and actually disbursed to trust beneficiaries," Plaintiffs completely ignore Ms. Herman's and Dr. Angel's testimony at both the October 2007 hearing and this trial. Ms. Herman, for example, presented DX-372, consisting of five binders of material supporting her calculations on DX-371. Within DX-372 are indications of the source documents she used, which are also in evidence, plus summaries of all of the Electronic Ledger Era data she drew upon for her analysis. See, e.g., DX-475, DX-476, DX-477, DX-478, DX-479, DX-480, DX-481. Last October, Ms. Herman presented evidence from the historical accounting reconciliation work. See, e.g., DX-126, DX-128, DX-125 at 00147-00148, DX-130, DX-132. Plaintiffs also ignore the extensive analyses in the DCV reports, which document the mapping of millions of transactions, including disbursements, and confirms the reliability of the accounting data overall. DX-152A - DX-158A.

Likewise, Dr. Angel's testimony included the introduction of his updated Total IIM chart, DX-483, comprising references to source documents supporting his disbursement figures. Although Dr. Angel "provided summary level disbursement information to Dr. Scheuren," Pl. PFOF 93, Dr. Angel maintains approximately 10,000 Indian documents in Morgan Angel's Cobell collection. Tr. 918:17-22 (Angel). Because Dr. Angel is a historian, who is an expert in Indian records and the history of Federal-Indian relations, Dr. Scheuren correctly relied upon Dr. Angel for those summary numbers.

Moreover, Dr. Angel's discussion of settlement packages belies Plaintiffs' assertion of no evidence of actual disbursements. Even a cursory review of DX-246, pages 46, 51-56, 57-62, provides clear evidence of actual disbursements to individual Indians on specific dates. Tr. 810:9-813-4 (Angel). These settlement packages alone show "a fairly extensive examination of individual Indian monies on a very check-oriented basis. In other words, down at the check level they're examining receipts and disbursements . . . ." Tr. 813:25-814:3 (Angel). Plaintiffs did not present a single beneficiary, much less a named representative of the class, to testify that he or she had not received a particular disbursement to which he or she was entitled. Nor did they present evidence of widespread disbursement failures. Even Mr. Pallais, after testifying as to the perceived unreliability of disbursement records, conceded that he had not reviewed settlement packages, Tr. 431:5-9 (Pallais), nor talked to any individual beneficiaries about disbursements or receipts, Tr. 445:25-446:5 (Pallais). In fact, Mr. Pallais had not reviewed any actual records underlying IIM accounts, Tr. 430:24:431:1 (Pallais), but merely reviewed reports about those records, Tr. 430:2-4 (Pallais).

4. Reliance on summary level disbursement information

95. Although proclaiming a "myriad of problems" with the assumption that disbursements was made to IIM account holders, Plaintiffs cite only one problem -- disbursements for investments – and their analysis. Dr. Palmer plainly misunderstood the nature of disbursements for investments purchased with IIM account holder funds. As PX-92, referenced in Plaintiffs' PFOF 95, confirms, these investments were held "for Indians" and, as such, the funds used to purchase them were properly considered disbursements. When the investments were redeemed, the proceeds were treated as collections and credited to the individual Indians for whom the investments were held, as recognized in the following exchange:

> THE COURT: Right, but the war bond gets redeemed at some point?
>
> [DR. PALMER]: And those proceeds from that presumably go back to the IIM Trust. So it's the Trust that purchases the war bond --

Tr. 1503:21-25 (Court and Palmer).

Following the exchange between the Court and Dr. Palmer, it became apparent that neither Plaintiffs nor Defendants utilized the exhibit that Dr. Palmer was discussing because it pertained to a year – 1919 – as to which neither side had disbursement data. Tr. 1505:6-14 (Court and Plaintiffs' counsel); PX-92.

96. Plaintiffs' use of bonds and war stamps for the Five Civilized Tribes as an example of funds invested, but counted as disbursed, is inapt. As the Court and Plaintiffs' counsel noted during trial, neither side used these in their calculations and, thus, they have no bearing on the calculations in either party's model. Tr. 1504:24-1505:16 (the Court and Plaintiffs' counsel).

5. Reliance on summary level disbursement information is appropriate

98. Plaintiffs cite to reports contained in their Compendium, PX-65, to argue that "there is no confidence that disbursement numbers reflect actual payments to beneficiaries." Pl. PFFCOL at 43. As discussed above in Defendants' Response to Pl. PFOF 88-92, Plaintiffs ignore Dr. Angel's testimony, Dr. Angel's Total IIM chart and its sources (DX-483), and the check-level disbursement records in DX-246 (pages 57-63, 46, 51-56), while overstating the significance of selective critical quotations taken from their Compendium, PX-65.

Although Dr. Angel acknowledged that PX-65's audit reports, many taken from his own historical collection, reflect the "problems that were found with IIM over the course of the years," Tr. 825:8-12 (Angel), he emphasized that the IIM system is "under review continually . . . it's being audited . . . the system itself is under frequent review, through its history, by GAO, internal reviews for Interior Department. It's a system of audit, reform, audit reform . . . refine - - you know, address the problems that have been found, correct." Tr. 911:4-7; 11-12 (Angel).

Even when reading GAO criticism of the deficiencies within the system, Dr. Angel insisted upon reading beyond the language shown him by Plaintiffs' counsel: "If you look at the next paragraph . . . 'Schedules of monies collected and <u>all disbursements are supported</u> by vouchers or other documents <u>showing the expenditure to have been properly authorized</u>. These accounts are audited by the General Accounting Office, and the balances reported verified.'" Tr. 913:17-914:1 (Angel), (quoting PX-95) (emphasis added).

106. Plaintiffs' assertion that the IIM System has a "history of negative trust balances" is dubious and at the same time irrelevant. Plaintiffs acknowledge that the negative balances mean that some beneficiaries were overpaid while others were underpaid. If such conditions indeed existed, the differences would cancel out when looking at aggregate disbursements. In any event, such problems are not relevant to the remedy now under consideration. <u>See</u> Tr. 686:1-4 (the Court) ("If money is lost through waste, fraud, and abuse, the government doesn't have the benefit of it, and there may be a damages claim for it, but I don't think there's an equitable benefit to the government claim for it.").

107. Plaintiffs' proposed findings concerning the number of beneficiaries with "whereabouts unknown" are immaterial. Although there are accounts for which Interior lacks a current address, there is no indication that Interior treats those accounts any differently than accounts for which the beneficiary's location is known. <u>See</u> <u>generally</u>

Interior Status Report to the Court Number Thirty-Two, at 9-10 (May 1, 2008).

Furthermore, while criticizing "the failure of the agencies to have addresses for beneficiaries," Plaintiffs fail to mention that Mr. Pallais was not aware of Interior's whereabouts-unknown project (WAU), Tr. 433:25-434:6 (Pallais), a project Plaintiffs themselves rely upon, citing Interior Status Report to the Court Number Thirty-Two.

109. Plaintiffs' proposed findings about internal controls miss the point entirely. Just as the presence of internal controls does not "prevent or detect errors," no evidence exists that the absence of any control has actually created anything more than the risk of an error. However, the evidence of extensive testing and analyses of the historical accounts performed by Mr. Rosenbaum, Ms. Herman, NORC, and other professionals for OHTA, strongly rebuts Plaintiffs' assertions.

110. While Plaintiffs again try to discredit government data regarding disbursements as being more unreliable than receipts data taken from the same historical records ("especially with respect to the disbursement of trust funds"), as discussed in our response above to Pl. PFOF 88-92, the June trial was the first time that Mr. Pallais drew such a distinction between the reliability of receipt records and the reliability of disbursement records. Def. PFOF 170.

111. Plaintiffs' proposed finding that Defendants "admitted liability" in preparing AR-171 is a fantastic claim for which they cite no testimony. It ignores the record that AR-171 was an interim calculation of throughput, based on the work done to that point. See generally 2007 Tr. 657:11-668:17 (Herman). It also takes no countenance of the Court's own observation in January 2008 that "[i]f one were to assume the unproven proposition

that the $3.2 billion collected before 1971 was, in fact, disbursed, the unaccounted for collections would total only $400 million -- a number that government attorneys have repeatedly said represents the average "float" in the IIM trust (primarily constituting funds in restricted accounts). Cobell XX, 532 F. Supp. 2d at 84.

6. Disbursement Periods and Data

a. 1887-1922

112. Although Plaintiffs concede that both parties' experts used the data from the Commissioner of Indian Affairs reports, they imply that such data is not entitled to be regarded as accurate unless it was "developed through an audit, accounting, or other type of examination." Pl. PFOF 112. Such an assertion ignores that these reports are both "public records and reports" and "ancient documents," for purposes of Rules 803(8) and 803(16) of the Federal Rules of Evidence, and as such, the statements contained therein are considered admissible to support the truth of the statements.

113. Plaintiffs propose that Dr. Palmer used figures "net of interest" to create his disbursement rate, but Dr. Palmer only deducted the segregated "interest" numbers and left in all undifferentiated interest contained within "Other Receipts." See supra Response to Pl. PFOF 49. More importantly, he created his ratio using collections overstated by the inclusion of all Osage annuity payments. See, supra, Response to Pl. PFOF 63-66.

114. The testimony cited by Plaintiffs does not support their assertion that "[i]t was unclear exactly what Dr. Scheuren did for [1887-1922] and he could not explain what he did." Pl. PFOF 114. In fact, as a review of his testimony confirms, Dr. Scheuren

considered the data for those years to be important and NORC was "looking at relationships that change over time." Tr. 994:4-9 (Scheuren). Moreover, the transcript confirms that Plaintiffs' counsel never asked the questions that their proposed finding asserts were answered in an unclear fashion.

115. Putting aside the question of whether Plaintiffs' question to Dr. Scheuren constituted a "confrontation," Plaintiffs wrongly suggest that Dr. Schueren was recalled to testify a second time to address all matters covered during his initial examination. In fact, as the Court is well aware, Dr. Scheuren was recalled for a very limited purpose, as confirmed in the following statement by Plaintiffs' counsel:

> Q. Dr. Scheuren, you'll recall during the time we spent together before you made a reference to an analysis that you had asked your staff to do, and we reserved for a limited purpose to call you back to ask you about that analysis once we had been provided the results of it. And that's why you're here today. Okay?

Tr. 1421:6-11 (Dorris) (emphasis added). Of course, because Plaintiffs chose to recall Dr. Scheuren, they could have asked Dr. Scheuren about the matters covered in this proposed finding, but they chose not to, opting instead to leave the matter as established in the initial examination.

116. While Plaintiffs' PFOF 116 contains numerous assertions about matters that Dr. Scheuren allegedly could not explain, none of the testimony cited by Plaintiffs comes close to asking him for an explanation. This proposed finding consists of argument prepared by Plaintiffs after the close of evidence, with no support for the arguments found in the cited record.

117. Dr. Palmer's analysis of disbursements is grossly inaccurate, for reasons already

set forth in Defendants' Proposed Findings of Fact, and as a result it does not present a reasonable approximation of an amount to be disgorged, regardless of whether the methodology would be "reliable and credible" if applied with actual data and supportable assumptions. See Def. PFOF 54-62, 69-93, and 95-172.

b. 1923-1949

118. Contrary to Plaintiffs' assertion that they "first learned of [the ISSDA reports] during the trial," four of the reports were exhibits during the October 2007 hearing. DX-27. Also, while Plaintiffs assert that they "first learned of [the ISSDA reports] during the trial," the reports at issue were located at the National Archives, as Dr. Angel testified, and nothing prevented Plaintiffs from accessing them on their own. Tr. 785:9-13 (Angel). Dr. Angel also made clear that all data referenced on DX-483, Dr. Angel's Total IIM chart, came from publicly accessible sources: "The information that comprises the total, the IIM chart, all but seven documents came from either National Archives, a library, a publicly-accessible report. Seven of the reports are Bureau of Indian Affairs annual investment reports, and we gathered those at the American Indian records repository." Tr. 794:25-795:4 (Angel).

Although Dr. Angel testified that "[t]here was no [ISSDA] report for 1945," Tr. 788:4 (Angel), Plaintiffs are incorrect in stating, "[n]o information could be found for 1945." See DX-483 (showing receipt data, but not disbursement data, for 1945), (citing DX-55 at 00004; DX-28 at 00003).

Plaintiffs' repeated assertion that NORC's time series analysis was not explained is refuted by the record, which confirms that Dr. Scheuren described the nature of the analysis during his direct examination. See Tr. 957:16-959:10 (Scheuren) (describing seven-year time-series model).

c. 1950-1971

124-125. The unreasonable nature of Dr. Palmer's quantitative adjustment to the 1955 reported disbursements amount, based upon qualitative assessments contained in the Comptroller General's audit report, is confirmed by the fact that Dr. Palmer confirmed in his own testimony that he could not quantify the impact of internal control weaknesses identified in the report. Tr. 1479:2-1480:3 (Palmer); PX-55.

When Dr. Palmer described his adjustment to the 1955 reported disbursements amount, the following exchange occurred between the Court and Dr. Palmer:

> THE COURT: So there's a ratio for deplorable and a ratio for pretty bad?
>
> THE WITNESS: No, I'm sorry, we only have one ratio.
>
> THE COURT: All right. I can't wait.

Tr. 1479:25-1480:3 (Court and Palmer).

126. Dr. Scheuren's testimony explained the process of Multiple Imputation and the subsequent time-series analysis used to generate estimates of disbursements for 1956-1971. Consequently, no basis exists for Plaintiffs' assertion that "[i]t is unclear how Dr. Scheuren's model derived his estimates for those years."

d. 1972 - 1985

127. The disbursement estimates that Plaintiffs highlight are limited in number and appear to have been done several years ago as part of initial record collections. AR-255; Tr. 730:1-25 (Herman). Ms. Herman's testimony in October, see 2007 Tr. 443:5-444:5

(Herman), and at this trial, Tr. 462:12-16 (Herman), demonstrate that the accounting work extending back into the Paper Ledger Era is just beginning, so the estimates available today will only improve as work proceeds. See also Tr. 565:4-6 (Herman) (acknowledging the accounting priority has been to start with the Electronic Ledger Era and work back in time).

128. Dr. Schueren also testified that he believed the approach taken by CD&L for the estimations in question was reasonable. Tr. 930:1-22 (Scheuren)

129. While Defendants do not dispute that Dr. Scheuren determined that additional uncertainty existed because of the additional information learned regarding the GLDL data (what Plaintiffs refer to as the "CD&L database"), Dr. Palmer's analysis of disbursements is grossly flawed, for reasons already set forth in Defendants' Proposed Findings of Fact, and as a result it does not present a reasonable approximation of disbursements for the 1972-1985 period. See Def. PFOF 54-62, 69-93, and 95-172.

e. 1986-2007

130-
131. Again, Dr. Palmer's analysis of disbursements is grossly flawed, for reasons already set forth in Defendants' Proposed Findings of Fact, and as a result it does not present a reasonable approximation of an amount to be disgorged. See Def. PFOF 54-62, 69-93, and 95-172. As previously explained, Dr. Palmer only considered disbursements that were made by check or electronic transfer and, as a result, wholly ignored other forms of disbursements, most notably journal entries and BB transfers. Even his analysis of CP&R data was not "detailed" as Plaintiffs assert, for he created estimates using only summary data and not the actual CP&R data. See supra Response to Pl. PFOF 29.

132. Plaintiffs' assertion that Defendants allegedly "had every opportunity" to contradict Dr. Palmer's CP&R and EFT analyses fails to acknowledge that Plaintiffs did not provide Dr. Palmer's initial rebuttal model until Sunday (two days before he testified) and did not provide his final rebuttal model until the morning that he was called by Plaintiffs to testify. See Tr. 1549:1-15.

134. Plaintiffs' contention that aggregate disbursements proven by Defendants are "simply the government's guess" is against the weight of the evidence. For example, the Ernst & Young study, the DCV project, the thousands of full reconciliations performed of per capita and judgments accounts, and the LSA work, confirm the disbursement data Defendants have used.

135. Dr. Palmer ignored audited figures in favor of his own assumptions, despite possessing only superficial familiarity with the data. His disbursement numbers differed from the audited numbers largely because his estimate missed the large share of disbursements that occur not by check or EFT, but by bookkeeping entries to the tribal trust accounts and other government appropriations. See, e.g., DX-236 at 00002; DX-238 at 00001.

7. The work performed by Mr. Rosenbaum

Generally, Plaintiffs' proposed findings concerning Mr. Rosenbaum's work attempt to undermine the Ernst & Young (E&Y) study of the five named plaintiffs and their predecessors in interest. As shown below, many of their criticisms simply misstate or overstate asserted shortcomings of the Paragraph 19 work. Most importantly, however, their proposed findings fail to reference any evidence that the government benefitted by even a penny at the expense of any named plaintiff or predecessor.

136. “Rosenbaum's report analyzed a virtual ledger of transactions reflecting the documents Interior had collected in response to Paragraph 19. ” Cobell XX, 532 F. Supp. 2d at 50. The record does not support Plaintiffs’ contention that the virtual ledger was created to show “defendants’ compliance with document production obligations” or “[b]ecause no actual ledger existed.” The virtual ledger is “a software tool that one can use to view the individual transactions in a particular account as well as view the documents that are associated and linked to those particular transactions. It is also a listing of the entire record of transactions for a particular account. . . . [I]t's a complete listing, then, from start to finish all in one place of the transactions in and out . . . [created] by looking at the transaction account ledgers that we had within the document database.” Trial 1.5 Tr. 64:15-65:4 (Rosenbaum 6/9/03 AM). The virtual ledger “effectively recreates the financial activity in each IIM account through time” based on transactions found in paper ledgers, account statements and electronic ledgers. AR-522 at 6; see Tr. 1405:1-11; see supra Response to Pl. PFOF 147.

137. Plaintiffs have had the virtual ledger and Paragraph 19 document database for at least five years but have offered no evidence that any conclusion in Mr. Rosenbaum’s report is “grossly overstated.”

138. Plaintiffs criticize Ernst & Young and Mr. Rosenbaum for not being “involved in the identification, search and collection of documents for the five named plaintiffs.” However, Ernst & Young was not hired for that work. As the Court recognized, Arthur Andersen was the accounting firm that was charged with the Paragraph 19 document

collection work. Cobell XX, 532 F. Supp. 2d at 49-50 (citing Trial 1.5 testimony of Arthur Andersen accountant Robert Brunner), quoted in Def. PFOF 178. Mr. Brunner testified that the searches "exceeded industry practices." Trial 1.5 Tr. 65:12-18 (Brunner 6/6/03 PM). Moreover, Plaintiffs offer no evidence that any specific documentation or transactional information was inaccurate. Nor do Plaintiffs explain why it would not make sense for a second major accounting firm to review independently the data collected by the first major accounting firm.

While Plaintiffs quote a portion of Cobell v. Norton, 283 F. Supp. 2d 66 (D.D.C. 2003) (Cobell X), in which the Court expressed some skepticism with certain data underlying Paragraph 19, they omit the very next sentence which states:

> But these factors should not be permitted to overshadow the primary issue, namely, whether the completion of the Virtual Ledger provides the Court with evidence that, in fact, Interior will be able to produce an index of trust-related documents adequate to support an accounting. Keeping in mind the above qualifications, the Court nevertheless concludes that the completion of the Virtual Ledger does provide such evidence.

283 F. Supp. 2d at 163.

This conclusion of the Court in Cobell X also demonstrates that the purpose of the Paragraph 19 virtual ledger was not, as Plaintiffs contend in Pl. PFOF 136, to demonstrate compliance with document production obligations.

139. Plaintiffs' conclusion that "no records could be found for 30.5% of the identified beneficiaries" is misleading. First, Plaintiffs offer no explanation why information on named Plaintiff Thomas Maulson should have been found in the Paragraph 19 search. Plaintiffs cite no evidence that Mr. Maulson had an IIM account, and Plaintiffs' counsel asked neither Mr. Rosenbaum (at the 2003 Phase 1.5 trial or the 2008 trial) nor Mr.

Brunner (at the 2003 Phase 1.5 trial) any questions about Mr. Maulson. Apparently, he had no IIM account. See Trial 1.5 Tr. 65:17-66:5 (Rosenbaum 6/9/03 AM). Because Ernst & Young did no work on Mr. Maulson, any records related to him or his seven predecessors was and remains immaterial. See Trial 1.5 Tr. 65:17-66:5 (Rosenbaum 6/9/03 AM). Therefore, only records for three of the identified thirty-six individuals could not be found. Furthermore, these three individuals were predecessors, of whom "one died in 1905, another one [in] 1910, and I think the third [died in] 1926." Trial 1.5 Tr. 66:14-15 (Rosenbaum 6/9/03 AM). Ernst & Young's findings and Mr. Rosenbaum's opinions are not undermined because records were not found for certain individuals.

140. Contrary to Plaintiffs' assertion that Mr. Rosenbaum "had no idea" whether transactions for the agreed-upon individuals existed before 1914, Mr. Rosenbaum testified that Ernst & Young "went back and looked at each of the transaction histories to determine -- I mean by looking at some of them it is obvious when they do begin, when they are open, and also looking at when the allotments would have been granted for some of the individuals." Trial 1.5 Tr. 7:9-13 (Rosenbaum 6/10/03 PM).

142. Although Mr. Rosenbaum acknowledged that "there may be transactions that are not listed" in the virtual ledger for the named Plaintiffs, Trial 1.5 Tr. 66:14-15 (Rosenbaum 6/10/03 PM), Plaintiffs have still pointed to no evidence that transactions might, in fact, be missing. Moreover, the calculated balances and actual recorded balances for those individuals matched. AR-522 at 6-7; Tr. 1390:20-1391:1 (Rosenbaum), cited in Def. PFOF 191.

145. While Mr. Rosenbaum "could not recall whether he had even seen any

documentation on per capita payments," Pl. PFOF 145 (citing Trial 1.5 Tr. 76:20-77:4 (6/11/03 AM Rosenbaum), he also testified that, to the extent such documentation was included in the Paragraph 19 collection, he would have reviewed it. Trial 1.5 Tr. 77:5-24 (6/11/03 AM Rosenbaum).

146. Plaintiffs wrongly assert that "Mr. Rosenbaum had no idea that IIM Trust funds are held in special deposit accounts prior to distribution." Mr. Rosenbaum testified, "I did make sure when we were talking about moneys that came into the accounts that we did account for them under the terms of the contemporaneous documentation." Trial 1.5 Tr. 24:20-25:24 (6/11/03 PM Rosenbaum). Providing examples of that contemporaneous documentation related to SDAs was Mr. Rosenbaum's primary Trial 1.5 exhibit D-155, which showed screen shots of the virtual ledger and a variety of linked Paragraph 19 documents. <u>See, e.g.</u>, D-155 at 13, 56-57, 65-66 (bills for collection for Exxon payment to payees including named plaintiff Mildred Cleghorn). <u>Compare</u> D-155 at 41 (journal voucher transferring funds – paid by Exxon – from SDA to individual IIM account of Mildred Cleghorn) <u>with</u> 2007 Trial DX-214 (journal voucher showing debit of SDA to individual IIM account).

Also, only some funds destined for Individual IIM accounts flow through special deposit accounts. AR-566 at 27; AR-533 at 4; <u>see</u> Tr. 70:3-15, Tr. 156:15-24 (Cason). As shown on documents such as journal vouchers and bills for collection, within the IIM System, "206.70" identifies an SDA, 2007 Tr. 320:13-14 (Ramirez), and "206.11" identifies Individual IIM accounts, 2007 Tr. 314:2, 320:10-12 (Ramirez).

147. While Mr. Rosenbaum conceded that he did not know what percentage of ledgers

were found, all of the ledgers were found for three of the four named plaintiffs who had IIM accounts. Tr. 1405:1-11 (Rosenbaum) (noting missing ledgers for Earl Old Person: "I think it was between 1958 and 1963, there were four separate periods of some months where we didn't have the appropriate page."). Ernst & Young reconstructed 556 transactions, compared to 12,617 found in ledger documents and electronic data. AR-522 at 6. In reconstructing transactions that did not appear in the Paragraph 19 ledgers, Mr. Rosenbaum was not "unclear," but stated that a check or a check register would be evidence of a disbursement transaction. Trial 1.5 Tr. 75:8-76:25 (Rosenbaum 6/10/03 PM).

148. Mr. Rosenbaum testified as an expert in both the 2003 Phase 1.5 trial and this trial, Tr. 1370:16-25 (Rosenbaum); Trial 1.5 Tr. 18:7-9, 52:16-22 (Rosenbaum 6/9/03 AM), and was the lead accountant for Ernst & Young, supervising ten to fifteen other accountants, Tr. 1374:21-1375:25 (Rosenbaum). During a two-year period preceding Trial 1.5, Mr. Rosenbaum and his team reviewed over 165,000 documents involving over 13,000 transactions, including those they reconstructed. AR-522 at 2, 6. Nevertheless, Plaintiffs characterize Mr. Rosenbaum's testimony as "remarkably vague about documents he had relied on that purported to support disbursements to any of the named plaintiffs." Specifically, Plaintiffs state that he "could not recall whether checks were used to support disbursements." Yet, in the testimony cited by Plaintiffs, Mr. Rosenbaum actually said he could not recall whether he had reviewed "a single check issued to Mildred Cleghorn," Trial 1.5 Tr. 59:15-60:15 (6/10/03 AM Rosenbaum) ("there is too much data for me to recall an individual document"), and responded "I don't know"

when asked whether he knew "what percentage of the transactions in the period 1985 to 2000 for disbursements were supported by checks with endorsements on the back." Tr. 1407:18-21. Similarly, Plaintiffs assert that Mr. Rosenbaum "could not recall if there were any checks at all supporting purported disbursements to plaintiff Mrs. Cleghorn." Instead, he testified he could not remember whether he himself had reviewed any checks for Ms. Cleghorn's account. Trial 1.5 Tr. 81:5-20 (6/10/03 AM Rosenbaum). Moreover, Mr. Rosenbaum described and explained a series of documents linked to the virtual ledger in his direct testimony during the 1.5 Trial. See, e.g., Trial 1.5 Tr. 29:11-31:3 (6/9/03 PM Rosenbaum) (discussing range lease income distribution for Elouise Cobell, D-155 at 29-31).

149. Plaintiffs incorrectly state that Mr. Rosenbaum "could not recall whether his virtual ledger included written authorizations from the beneficiaries supporting the purported disbursements." Pl. PFOF 149 (citing Trial 1.5 Tr. 32:18-33:2, 35:17-36:8 (6/11/03 PM Rosenbaum)). Instead, Mr. Rosenbaum stated that "I do know that we had certain documents that were authorizations for payments and that sort of thing." Trial 1.5 Tr. 35:23-25 (6/11/03 PM Rosenbaum). Similarly, although Plaintiffs attempt to impeach Mr. Rosenbaum for not relying on a BIA manual, Pl. PFOF 149, they fail to even identify any specific requirements relating to disbursements within the manual.

150. Plaintiffs also attempt to show that the virtual ledger contained errors based on testimony from their Trial 1.5 witness Dwight Duncan. However, Mr. Duncan was not offered as an expert in accounting or auditing, Trial 1.5 Tr. 68:15-19 (5/28/03 AM

Duncan), and had first worked with the virtual ledger and document database during the trial at which he testified, see Trial 1.5 Tr. 46:14-16 (7/3/03 AM Duncan). In contrast, Mr. Rosenbaum and his team of Ernst & Young accountants worked with the documents and virtual ledger for over two years. Tr. 1374:12-20 (Rosenbaum).

Plaintiffs claim that many of the documents "bore no relationship" to the linked transactions. Yet Mr. Duncan acknowledged that he did not understand specific documents he claimed should not have been linked. See, e.g., Trial 1.5 Tr. 87:13-88:25 (7/3/03 AM Duncan) (admitting no knowledge of basis for transaction listing in P-310 at 13); Trial 1.5 Tr. 94:4-95:14 (7/3/03 AM Duncan) (admitting no knowledge of form shown in P-310 at 17 or form shown in P-310 at 15-16). Furthermore, Mr. Duncan's own testimony provided examples that either demonstrated how the linked document related to the transaction, Trial 1.5 Tr. 32:13-22 (7/3/03 AM Duncan), or that the virtual ledger was over-inclusive by linking to documents for which he could not "fathom" a relationship to the precise transaction. Trial 1.5 Tr. 33:14-25 (7/3/03 AM Duncan) (discussing 58 documents linked to $240 posting to Mildred Cleghorn's account).

Notably, Plaintiffs opted not to depose Mr. Rosenbaum before Trial 1.5, see, e.g., Trial 1.5 Tr. 95:15-17 (7/3/03 AM Duncan), and opted not to ask him at this trial about the transactions and documents Mr. Duncan addressed during Trial 1.5.

Finally, Plaintiffs have offered no evidence that Ernst & Young considered the transactions about which Mr. Duncan testified to have been among the 10,798 "supported transactions" instead of among the 1,819 "insufficient documentation" transactions in the virtual ledger. See AR-522 at 3, 14; P-310 at 7, 11, 30 (virtual ledger tables do not indicate whether transaction is sufficiently supported). Obviously, transactions that are insufficiently documented may have some documentation linked to them. Thus, Mr. Duncan's opinions about the appropriateness of Ernst & Young's linking of documentation for certain transactions do not qualify as competent or probative evidence.

151. Contrary to Plaintiffs' contention that LRIS was unreliable, Pl. PFOF 151 (citing 2007 Tr. 1317:17-25 (Redthunder)), Mr. Rosenbaum testified that "to the best of my knowledge, for all of the transactions and for all of the ownership interests for all of the accounts that we looked at, the information contained within the LRIS system was consistent with those of the probate documents." Trial 1.5 Tr. 63:22-64:3 (6/10/03 AM Rosenbaum). Moreover, Plaintiffs' witness Sharon Redthunder did not testify that LRIS was "unreliable and can not be used to determine accurate ownership interests." She testified only that it was "not up to date" when she was using it. 2007 Tr. 1317:17-25 (Redthunder). Mr. Rosenbaum used LRIS for historical accounting, not current active trust fund disbursements.

152. Although Plaintiffs assert that IRMS data was unreliable, Pl. PFOF 152, Plaintiffs offer no proof to support that assertion. Thus, Mr. Rosenbaum's statement that he was not aware of "the testimony before this court on numerous occasions that the information on the IRMS is not reliable," is evidence of nothing. Tr. 1414:9-13 (Rosenbaum). Plaintiffs' implication that Mr. Rosenbaum's unfamiliarity with a "BIA Data Cleanup Subproject" concerning IRMS somehow undermined his opinions and conclusions is likewise without record support.

153. Plaintiffs claim that Mr. Rosenbaum "did not know how the funds [for the named

plaintiffs] were actually invested," apparently without reviewing his expert report, AR-522 at 4, 10-11. That document explains how interest was credited to IIM accounts during different time periods, AR-522 at 10, and how Ernst & Young recalculated interest to determine whether it was correct, AR-522 at 10-11. Ernst & Young compared the interest paid in the accounts to records that stated what the relevant interest factors for IIM accounts were at the time. AR-522 at 10. Mr. Rosenbaum testified, contrary to Plaintiffs' assertion, that he believed that the memoranda stating the interest factors were created contemporaneously at the time the funds were invested. Trial 1.5 Tr. 77:11-24 (6/10/03 AM Rosenbaum).

How those interest rates were derived or whether the interest factor was as high as Plaintiffs would have preferred is not part of this trial. At any rate, Mr. Rosenbaum's testimony that he did not know "how those interest factors were derived," Trial 1.5 Tr. 74:22-23 (6/10/03 AM Rosenbaum), does not affect his conclusion "noting no material differences" between the "credited interest amounts using the account balances" and the recalculated amounts using "the interest rate factors." AR-522 at 4.

Whether the "historical imbalance between records at Treasury and those at Interior," which the government resolved in 2004, 2007 Tr. 906:5-6 (Winter), was considered by Mr. Rosenbaum did not affect Ernst & Young's study of whether interest transactions were supported by documentation. See, e.g., Trial 1.5 Tr. 86:8-15 (6/11/03 AM Rosenbaum). As for the imbalance between the general and subsidiary ledgers at Interior, that circumstance historically resulted in too much interest being posted to individual IIM accounts. Cobell XX, 532 F. Supp. 2d at 74. Plaintiffs offer no proof of how either imbalance harmed the named Plaintiffs, much less how it resulted in any benefit to the government.

154. As shown above, Plaintiffs' attack on the analysis of the named Plaintiffs and their predecessors by Ernst & Young and Mr. Rosenbaum is unsupported by the evidence. Instead, as established in Defendants' proposed findings, the Paragraph 19 analysis by Ernst & Young shows that the income collected for and paid to the named Plaintiffs and their predecessors were supported by documentation and, more importantly, that the government did not benefit from revenues collected for those individuals. Def. PFOF 182-193.

8. The Treasury/GAO Settlement Packages

Plaintiffs ignore record evidence in arguing that the Treasury and GAO settlement packages do not prove proper disbursements to any beneficiary. Pl. PFOF 155-168; see generally Def. PFOF 207-225.

155-156. Plaintiffs' assertion that "[t]here is evidence that at least some ISSDAs submitted documentation for review concerning funds received and disbursed by them" understates the level of compliance found during the review by the Reznick Group. As their reports confirmed, there was overwhelming compliance with procedures, based upon the sample of reports reviewed by the Reznick Group. See DX-510; DX-511. Plaintiffs' attempt to trivialize the settlement packages is also contradicted by their own reference to "20,676 Treasury settlement packages" and "31,418 to 50,000" GAO settlement packages. Pl. PFOF 156. As Dr. Angel testified, just one of these settlement packages was "over three thousand pages." Tr. 810:12-16 (Angel). Further, "there were a hundred agencies" in the

BIA at this time, who submitted settlement packages for review "[q]uarterly to semi-annual[ly] . . . ." Tr. 813:8-9; 11-12 (Angel).

158-159. Plaintiffs' PFOFs 158 and 159 cite to the Court's decision granting them partial summary judgment in regard to the settlement of accounts packages. The Court found for Plaintiffs as to five of the seventeen grounds they put forth, rejecting the other twelve. Defendants respectfully disagree with the five grounds, and strongly disagree with Plaintiffs' statement that the evidence was "uncontradicted." Nevertheless, Defendants do not now seek to re-litigate the issues previously decided by the Court but, rather, adduced evidence regarding the tens of thousands of settlement packages maintained by the National Archives and the settlement of accounts process because they are relevant for purposes raised by Plaintiffs' restitution claims, not their prior motion for summary judgment.

160. Plaintiffs' proposed finding is directed toward an issue different from the one for which evidence was adduced regarding the Treasury and GAO settlement package review process. Regardless of whether the settlement package review process constituted an audit or settlement of IIM accounts sufficient for purposes of the 1994 Act, the evidence showed that Treasury and GAO auditors conducted a regular and orderly examination and settlement process which reinforces a conclusion that the records are reliable. Tr. 1341:12-25 (Banda); DX-510; DX-511.

161. Plaintiffs cite testimony from Don Hammond, former Fiscal Assistant Secretary at the Department of the Treasury, for the proposition that the settlement of account packages were roughly comparable to a review of an employee's travel voucher. While

he did compare the settlement packages to the review of a travel voucher, Mr. Hammond characterized that as “probably a poor analogy.” Trial 1.5 Tr. 92:6 (5/13/2003 a.m.) (Hammond).

More importantly, Mr. Hammond explained that this review covered an Indian disbursing agent’s composite activity over a specific time period and affected the full range of that agent’s activity. Trial 1.5 Tr. 23:22-24:3 (5/13/2003 a.m.) (Hammond). Activity within IIM accounts was a part of the disbursing agent’s overall account activity. Trial 1.5 Tr. 79:20-25 (5/13/2003 a.m.) (Hammond). The review evidenced by the settlement of account packages required the balancing out of a disbursing agent’s accounts and an examination of supporting documentation, to ensure that the amounts identified on the supporting documentation were consistent with the amounts recorded by the disbursing agent. Trial 1.5 Tr. 24:4-10; 92:6-12 (5/13/2003 a.m.) (Hammond). Notably, a disbursing officer would be held personally liable if a disbursement was proven to be incorrect. Trial 1.5 Tr. 92:13-20 (5/13/2003 a.m.) (Hammond).

Because the settlement of account packages have been stored at the National Archives as permanent Indian records for an extensive period of time, Mr. Hammond understood them to be complete and accurate. Trial 1.5 Tr. 25:12-18 (5/13/2003 a.m.) (Hammond).

162. Plaintiffs argue that “neither [Dr. Angel] nor anyone else associated with defendants has performed an extensive review of” the settlement packages, yet they concede that Dr. Angel reviewed “approximately 50,” and that Mr. Banda “reviewed 180 . . . .,” Pl. PFOF 164. As Dr. Angel testified, just one of these settlement packages was

"over three thousand pages." Tr. 810:12-16 (Angel). Dr. Angel examined that particular package down to the individual check level. Tr. 810:9-813:4 (Angel) (discussing DX-246 at pages 57-63, 46, and 51-56). Plaintiffs' allegation of no "extensive review" cannot be squared with Dr. Angel's analysis of "a question about a dollar" in that particular package. Tr. 813:2-3 (Angel).

163. Plaintiffs are wrong in stating that Mr. Mushtaq "could provide no evidence regarding disbursements to IIM trust beneficiaries." The evidence Mr. Mushtaq presented clearly constitutes contemporaneous evidence of disbursements. As explained by Mr. Mushtaq, several types of documents within the GAO settlement packages that he personally reviewed report the disbursement of funds within the IIM system, including Account Current forms, Official Receipts, Recapitulations, IIM ledgers, Abstracts of IIM and Special Deposits, and Reports of IIM Disbursements. Tr. 1292:13-1296:16 (Mushtaq); DX-504 at 4-11, 15-17, 20-21. Furthermore, although Mr. Mushtaq reviewed only one cashed IIM check with the Court due to time considerations, his review of the GAO settlement packages uncovered bundles of cashed IIM checks contained within several of those packages, only some of which he was able to photograph. Tr. 1288:8-23; 1307:19-1309:2 (Mushtaq); DX-504 at 26-29. Finally, not only do the documents within the settlement packages contain detailed evidence of disbursements, they also constitute evidence that GAO auditors conducted a detailed and orderly examination and settlement process, which supports a conclusion that the records are reliable. Tr. 1299:17-1302:6, 1309:3-1310:13 (Mushtaq); DX-504 at 3-25, 30-39.

165. Based upon the count of Plaintiffs' counsel – referenced in Plaintiffs' proposed

finding – more than half of the Treasury settlement packages reviewed by Reznick Group did contain IIM trust data. Pl. PFOF 165 (referencing Mr. Smith's representation at Tr. 1352:19-21 (Smith) that forty-two of ninety did not have IIM trust data).

166. Plaintiffs' proposed finding mischaracterizes NORC's conclusions, as set forth in AR-436. The second paragraph on page 6 of the cited NORC report presents a much different set of conclusions than those presented in Plaintiffs' narrative:

> It is, thus, evident that <u>Treasury and GAO examined and settled</u> the balance of an ISSDA's accounts <u>regularly and certified the accounts by issuing the Certificate of Settlement</u>. In addition to appropriated funds (which include Tribal funds), <u>most of these accounts contained individual Indian funds</u>, which were subject to the same audit process. The question of whether account balances were systematically checked at an individual Indian account level has not been answered <u>conclusively</u>. <u>There is ample evidence, though, that the Treasury and GAO auditors did reconcile the collection schedules against leases and disbursements against cancelled checks returned by the depository banks</u>.

AR-436 at 6 (39-01-06) (emphasis added) (cited in Pl. PFOF 166).

Plaintiffs' proposed finding misstates NORC's conclusion. Rather than "conclud[ing] that the hypothesis could not be supported," Pl. PFOF 166 (citing AR-436 at 6 (39-01-06)), NORC simply concluded, "No further sampling or record searching is needed to address the hypothesis NORC set out to test." AR-436 at 6 (39-01-06).

167. Mr. Banda only confirmed that Reznick Group had made no efforts to determine if IIM funds were disbursed to a beneficiary as part of its review of the Treasury and GAO settlement packages. Tr. 1353:14 (Banda) ("It wasn't done by us."). A review of other efforts in this litigation, such as the results of the LSA Project and the Paragraph 19 review, revealed other efforts to make such determinations, however.

Moreover, Dr. Angel's discussion of just one settlement package provided clear proof of specific check disbursements to specific individuals on specific dates. Tr. 810:9-813:4 (Angel) (discussing DX-246 at pages 57-63, 46, and 51-56).

168. Plaintiffs again cite to their Compendium, PX-65, in arguing that "the unfortunate state of disbursements . . . during the period the settlement packages had been prepared" render the "procedures in place" unreliable for purposes of proving that disbursements occurred. Plaintiffs' proposed finding consists of argument and is irrelevant to the evidence adduced during the June 2008 hearing with regard to the Treasury and GAO process for reviewing ISSDA settlement packages. Although Mr. Pallais reviewed reports referenced in the Compendium, he conceded that he had not reviewed settlement packages. Tr. 431:5-9 (Pallais). This is in sharp contrast to Dr. Angel who reviewed "approximately 50," Pl. PFOF 162, and Mr. Banda who "reviewed 180 . . . .," Pl. PFOF 164.

F. Comparison of Experts' Models and Spreadsheets

1. Dr. Scheuren's Model

169. Plaintiffs' proposed finding that "Dr. Scheuren's model is fatally flawed," consists largely of argument, with no supporting citations to the record. To the limited extent Plaintiffs have cited the record, their citations do not support the general statements they asserted:

- Dr. Scheuren's cited testimony from page 1049 simply confirms that the Multiple Imputation process involves the use of software, which Plaintiffs were provided prior to Dr. Scheuren's testimony. Tr. 1049:4-19 (Scheuren).
- Dr. Scheuren's cited testimony from page 1054 refers to a single "outlier"

generated for an ending balance, an irrelevant estimate since NORC's model was only utilized for estimates of collections and disbursement. Tr. 1054:15-21 (Scheuren); see Tr. 964:15-25 (Scheuren) (fourth step in NORC's Multiple Imputation analysis involved calculating the difference between total collections and total disbursements to generate a "Calculated Balance.").

- More significantly, the characterization of the model as being "prone to producing 'spectacularly bad outlier[s]," Pl. PFOF 169, has no support in the record. In fact, Dr. Schueren explained, in the same response, that NORC had a process to look for outliers, that the single estimate noted by Plaintiffs' counsel was "the worst" and that "[t]here are other outlie[r]s but they're mostly small." Tr. 1054:15-21 (Scheuren).
- Finally, the words "intractable bias" are in the context of a general discussion of the three types of missing data issues addressed by statisticians through methods such as Multiple Imputation. See Tr. 1042:11-1045:8 (Scheuren).

170. Plaintiffs' proposed finding grossly mischaracterizes Dr. Scheuren's testimony. Contrary to Plaintiffs' assertion, Dr. Scheuren's confusion in the cited testimony only pertained to his misreading the exhibit cited by Plaintiffs' counsel, DX-372 (page 10), i.e., he obviously read the caption "Estimated Tribal IIM" and initially thought it pertained to the entire exhibit. As Plaintiffs' counsel subsequently showed, the total receipts amount for 1934 – $10.6 million – was a total receipts amount, and as Dr. Scheuren confirmed, the $10.6 million amount was the figure appearing on NORC's schedule, DX-461. Tr. 1022:14-21 (Scheuren).

Further, Dr. Scheuren's testimony does not support Plaintiffs' assertion that Dr. Scheuren first learned about the understatement of collections during 1923-1949 during cross-examination. In fact, when asked about this subject, Dr. Scheuren confirmed, "I heard this business about understatement, of course." Tr. 1023:3 (Scheuren). Plaintiffs apparently rely on Dr. Scheuren's subsequent sentence – "This connection that you've just made between [DX-372 and DX-461] I am hearing and seeing for the first time," Tr. 1023:4-5 – which obviously refers simply to the fact that Dr. Scheuren had not considered the two exhibits together before cross-examination. His initial statement, however, confirms that he did understand that collections data had been understated.

The final aspect of Plaintiffs' proposed finding confuses the nature of NORC's analysis by suggesting that NORC was modeling simply collections. In fact, as a review of the data in DX-461 shows, collections and disbursements tended to move in the same direction, i.e., when collections increased, disbursements tended to increase, and when collections decreased, disbursements tended to decrease. Moreover, as Dr. Angel confirmed, both collections and disbursements for 1923-1949 were understated, see Def. PFOF 266-268, and NORC's analysis was not asymmetric, as Plaintiffs suggest it should have been, because there was no evidence that the net overstatement of receipts and disbursements was only "in the upwards direction." Pl. PFOF 170.

171. Although Plaintiffs claim that Dr. Scheuren's model is flawed because it does not adjust revenues for 1923-1949, they have not shown that an adjustment to revenues was appropriate for that period. Unlike Dr. Palmer, Dr. Scheuren's analysis took into account that Dr. Angel concluded that both receipts and disbursements were understated during

1923-1949. As explained in Defendants' Proposed Findings of Fact, although Dr. Palmer decided to adjust the 1923-1949 collections data upward based upon Dr. Angel's testimony, he did not adjust the 1923-1949 disbursements data upward for those years, even though Dr. Angel's testimony referred to understatement of both receipts and disbursements. Tr. 1585:12-1586:24 (Palmer). Def. PFOF 100-102. Moreover, as explained previously, Dr. Palmer arbitrarily applied the 77% figure appearing in DX-365, even though he had no understanding as to what DX-365 or the 77% figure represented. Def. PFOF 95-99.

172-
173. Plaintiffs reiterate their challenges to Dr. Schueren's assessment of the 1972-1985 GLDL data. As previously explained, Dr. Scheuren's testimony explained how he addressed the fact that some of the GLDL data provided to him contained estimates, and his testimony – unrefuted by rebuttal testimony – confirmed that it was possible to make a reasoned adjustment to NORC's initial conclusions to reflect the new information about the GLDL data. See Def. PPOF 295-306.

174. Although Plaintiffs assert that the NORC analysis should have used the $121 million figure noted in PX-72, even Dr. Angel confirmed that after reviewing the exhibit, he still would not have included it in his analysis of collections for 1968 because it did not represent a reported amount for a specific year. Tr. 918:23-919:19 (Angel).

175-
180. Plaintiffs' PFOF 175-180 raise a lengthy series of questions which their counsel could have asked as cross-examination and/or could have been addressed by a rebuttal expert witness. Having neither cross-examination nor rebuttal testimony to offer,

however, these proposed findings stand only as argument, are wholly unsupported by evidence, and should be summarily rejected.

In addition, while Plaintiffs argue in Pl. PFOF 178 that "there are many errors and discrepancies in the balance information that Dr. Scheuren obtained from Dr. Angel" and cite Dr. Angel's reliance on 1972 documents that did not reflect amounts that had been held in Treasury at that time, it was perfectly logical for Dr. Angel's Total IIM chart, DX-483, to not show funds "held in Treasury" for 1972. A review of Dr. Kehoe's chart addressing the placement of funds for 1966-1985, DX-497-0010, demonstrates that funds held in Treasury during this time frame, including 1972, were too small to even annotate on the chart. As Dr. Kehoe noted, "On any particular day during this period, a small percentage of IIM system funds would have been available in the Treasury for disbursement needs and was not invested." DX-497-0010.

Likewise, Plaintiffs criticize Dr. Angel for understating "balances for 1953 by almost $1 million." Pl. PFOF 178.[8] However, an examination of the Total IIM chart, DX-483, reveals that Dr. Angel used a different source document for 1953, DX-61, than the one shown to him by Plaintiffs' counsel, DX-64. The source document for 1953, DX-61-00007, clearly shows a figure that matches the number on the Total IIM chart.

Plaintiffs also criticize Dr. Angel for the 1925 disbursement information he used. Pl. PFOF 178. As Plaintiffs themselves note, however, the anomalies Dr. Angel observed in the data raised a "'red flag'" for him, Pl. PFOF 178. Rather than keeping

[8] During the cross-examination of Dr. Angel, Plaintiffs' counsel referred to this "almost $1 million" as "roughly $900,000." Tr. 906:3 (Plaintiffs' counsel.)

such "red flags" to himself, Dr. Angel appropriately conveyed to NORC his impression that certain numbers were "out of bounds." Tr. 876:17-21 (Angel). Therefore, along with conveying the data itself, Dr. Angel also worked to ensure that Dr. Scheuren "understood the limitations of the data itself. For example, . . . the limitation of those receipt and disbursement reports . . . [for] 1922-1949." Tr. 798:17-23 (Angel).

Plaintiffs next criticize Dr. Angel for his "failure" to include pre-1928 data on funds invested in government securities. Pl. PFOF 178. They argue, "Dr. Kehoe . . . reported $27 million of IIM trust funds in government securities in 1926, which Dr. Angel does not include in his chart." Pl. PFOF 178. Examination of Dr. Kehoe's charts, however, reveals no pre-1928 figures for funds held in government securities, much less $27 million in 1926 - in fact, there is no line-item for 1926. DX-497-002-004.[9] Therefore, Plaintiffs' premises for arguing that "the balance information Dr. Scheuren used is unreliable," Pl. PFOF 178, are false.

181. Plaintiffs repeat their assertions in Plaintiffs' PFOF 12 by challenging the appropriateness of Multiple Imputation, basing their assertion on a single article, authored by another statistician, Professor Joseph Schafer. Pl. PFOF 181. As previously explained, a review of the article and Dr. Scheuren's testimony regarding the article do not support Plaintiffs' assertions. For example, the article notes, at the outset, that "[i]mputation, the practice of 'filling in' missing data with plausible values, has long

[9] Perhaps Plaintiffs refer here not to DX-497, but to PX-124. Tr. 870:14-15 (Angel). However, the Court did not accept PX-124 into evidence. Even so, Dr. Angel made clear in his testimony that any figure of $27 million was a cumulative pre-1928 figure, rather than a figure for 1926. Tr. 871:14-15 (Angel) "Q: Cumulative for that year? A: No, no, no. Cumulative. Total figure.")

been recognized as an attractive approach to analyzing incomplete data." PX-137, page 1. As Dr. Scheuren explained, "[i]f there is a problem with the multiple imputation in [Cobell], it doesn't affect our result except that we may have slightly overstated the uncertainty as a result of it" and that the significance of an overstatement of uncertainty is "[t]hat the amount of money that is at issue is larger." Tr. 1064:12-19 (Scheuren). Thus, if anything, the uncertainty conclusions of Multiple Imputation inure to the benefit of Plaintiffs. Plaintiffs, of course, could have called a rebuttal expert to challenge Dr. Scheuren's use of Multiple Imputation but, apparently, chose not to.

182. Plaintiffs repeat arguments about the "nature and scope of missing data," but this is, again, an area where Dr. Scheuren offered his opinions about the conclusions to be drawn about uncertainty because of the missing data, and Plaintiffs did not offer rebuttal expert opinions to the contrary.

184. Plaintiffs' final two sentences in this proposed finding are neither intelligible nor supported by citation. Similarly, the transcript citations appearing earlier in the proposed finding do not support the final two sentences. Accordingly, those sentences should be disregarded.

185. Plaintiffs' proposed finding is a summary conclusion setting forth their arguments which should be rejected, in part, for the reasons set forth with regard to the preceding proposed findings 169-184.

2. Dr. Palmer's Model

186-
187. Plaintiffs' PFOF 186 and 187 consist of a summary of their contentions. Defendants' rebuttal of the fact alleged here can be found elsewhere in this response. See supra

Response to Pl. PFOF 29-30, 43-45, 60-69, 82, 92-135, 189-205, 209-219, and Response to Court's Notice to the Parties.

a. Dr. Scheuren Endorsed Plaintiffs' Experts' Methodology

188. While Plaintiffs' proposed finding fairly summarizes Dr. Scheuren's assessment of Professor Cornell's methodology, it wrongly concludes that Dr. Palmer's rebuttal model addressed Dr. Scheuren's comments about Professor Cornell's failure to address uncertainty and to use available data.

As explained above and in Defendants' proposed findings of fact, Dr. Palmer failed to use available data, often choosing to apply arbitrary and unjustified adjustments to reported data and failing to take into consideration disbursements other than those made by check or electronic funds transfer. See Def. PFOF 60, 73-91, 95-102, 108-117, 121-144, and 160-165.

Plaintiffs' assertion that "there is no dispute that there is tremendous uncertainty regarding the data in this case" fails to address Dr. Scheuren's criticism of Plaintiffs' models. As Dr. Scheuren explained, Multiple Imputation allows a statistician to assess the uncertainty associated with missing data. Tr. 932:9-23 (Scheuren). By comparison, Dr. Scheuren confirmed that Professor Cornell's model did not allow a statistician to provide an estimate of the amount of uncertainty associated with missing data. Tr. 934:17-23 (Scheuren).

Unlike Plaintiffs' vague assertion that "there is tremendous uncertainty regarding the data in this case," Dr. Scheuren was able to quantify the uncertainty associated with the missing data. Using the upper bound of 97.5%, Dr. Scheuren concluded that the difference between \$833.5 million and the reported balance of \$423.7 million, or \$409.8 million, "is a number which the systems work cannot [explain.]" Tr. 975:5-22 (Scheuren). Further, unlike the vague statement in Plaintiffs' proposed finding, Dr. Scheuren was able to conclude that with a 97.5% level of confidence, a difference no greater than \$409.8 million is unexplained because of the missing data and "that's as bad as it gets." Tr. 975:23-976:3 (Scheuren).

b. Linear Interpolation

189. While linear interpolation may be a reasonable approach to model missing information, it fails to assess uncertainty caused by the missing data, <u>e.g.</u>, Tr. 932:9-23 (Scheuren), and, in any event, the results of the model are only credible if based upon the available factual data and factually accurate assumptions, <u>e.g.</u>, Tr. 986:20-23 (Scheuren).

c. CP&R Data and EFT/Pacer Data

190. The Administrative Record includes references to Treasury checks from 1987 (not 1998) through 2002. The Treasury transmittal clearly indicates that the file did not contain all checks. PX-66.

195. Plaintiffs here acknowledge that their disbursement calculation did not consider the actual CP&R data, but used summary check information from two tables in the Administrative Record (prepared by Treasury). This occurred despite the fact that Treasury had offered as early as 2003 to perform searches of the CP&R database for Plaintiffs at cost. <u>See</u> Response to Pl. PFOF 29.

196. Plaintiffs incorrectly assert that "[i]f checks are not cashed and paid, the funds remain in the TGA." As established by the Treasury witnesses, cash that is deposited in

the TGA is usually spent on the same day to fund expenditures of the government, Tr. 1231:1-3 (Grippo), and is never frozen or set aside in the TGA. Tr. 1231:16-17 (Grippo). When the Department of the Interior cuts a check to be paid to an Individual IIM account holder, that is reported to Treasury in a Statement of Transactions and, at that time, a debit is made to the fund balance in 14X6039. If the check is not presented for payment, then the TGA is not affected. Treasury takes over the accounting once the check is issued, and Treasury would have a liability for the amount of that check until it is presented for payment. Tr. 1205:6-1207:6 (Hoge); Tr. 1271:13-1272:20 (Grippo).

The testimony of Professor Cornell that Plaintiffs cite as support for Pl. PFOF 196 does not undermine the credible testimony of the knowledgeable Treasury witnesses. When asked if he knew "where the money remained" if checks were not paid or cashed, Professor Cornell offered only a presumption: "Well, presumably it would remain in the Treasury account, because it wasn't drawn down from it." Tr. 311:18-21 (Cornell). He further confirmed on cross-examination that his knowledge of the TGA stemmed from work that he performed in 1986, which he conceded had "been a while." Tr. 328:16-20 (Cornell).

Plaintiffs' proposed finding, based on Professor Cornell's supposition, is also contradicted by the evidence adduced at the October 2007 trial that Treasury recredited uncashed checks to Interior and that Interior recredited uncashed check amounts to IIM accounts. 2007 Hearing Tr. 846:17-847:5 (Winter); 2007 Hearing Tr. 1294:16-1295:18, 1300:15-24 (Cymbor); 2007 Hearing Tr. 290:14-291:2, 292:4-296:3 (Ramirez).

197. As demonstrated above and in Defendants' Proposed Findings of Fact, Plaintiffs'

rebuttal model does not "incorporate[] any and all reported information regarding assumed disbursements." The model disregarded all disbursements other than those made by check or electronic fund transfer. See Def. PFOF 108-117. This omission occurred even though the fact of disbursements by transfer was made known before trial. See, e.g., DX-371 at 00002 n.5 ("Disbursements represent all outflows from the Individual Indian Money (IIM) System. These outflows include, but are not limited to, transfers to the Tribal Trust, checks, and electronic funds transfers.") (Emphasis added.)

199. As explained above and in Defendants' Proposed Findings of Fact, Dr. Palmer's analysis of disbursements disregarded disbursements other than those made by check or electronic funds transfer. See Def. PFOF 108-117.

Plaintiffs' assertions regarding "fraud, waste, and abuse" should be disregarded by the Court; Plaintiffs presented no evidence to support this assertion.

Plaintiffs' final assertion regarding the allegedly "conservative" nature of their approach is argument not supported by the evidence.

200. Plaintiffs' own description of check code "Z" makes clear that "Z" checks were not canceled checks, as Plaintiffs later state, but unissued checks. This nuance is important here, because Treasury reports a "Z" check having a $0 amount.

201. Defendants have addressed in detail the flaws in Dr. Palmer's estimate of amounts paid by check which Plaintiffs allege "never left Treasury." See Def. PFOF 136-159.

204-205. As explained above and in Defendants' Proposed Findings of Fact, the 74.45% disbursement rate and resulting 134.1% ratio calculated by Dr. Palmer is plainly flawed and unreliable. See Def. PFOF 160-165. Among other things, Dr. Palmer disregarded disbursements other than those made by check or electronic funds transfer. Indeed, after hearing Dr. Palmer's testimony about how Plaintiffs' rebuttal model ignored tribal transfers and how it calculated collections and disbursements, the Court observed, "That may be where the 34 percent comes in." Tr. 1633:17-1634:23 (the Court).

206. Plaintiffs' proposed finding is argument as to which no response is required.

d. Court's Questions Regarding Disbursements

209-210. Plaintiffs deny conceding that CP&R data does not include amounts disbursed to tribes and others. However, they then offer no support for their broad assertion that "[a]ll such payments that left the trust and Treasury were by checks or EFTs." Pl. PFOF 210 (emphasis added). Contrary to Plaintiffs' assertion, the cited October 2007 testimony of Ms. Herman does not mention checks distributed to tribes, third parties and others under the 4844 ALC within the CP&R database, let alone support the conclusion that all amounts that left the IIM System were by checks or EFTs.

The evidence is to the contrary. See, e.g., DX-371 at 00002 n.5 ("Disbursements represent all outflows . . . [which] include, but are not limited to, transfers to the Tribal Trust, checks, and electronic funds transfers.") (emphasis added); Tr. 542:11-18 (Herman); DX-474 (Colville tribal money in SDA example); DX- 478 (Rosebud Sioux tribal money paid to employees); DX-475 (Turtle Mountain Band tribal funds in "P" account); DX-477 (Wichita tribal money in "T" account); DX-480 ($9 million Warm Springs "T" account BB transfer to tribal trust); DX-481 ($5.6 million in timber revenues in SDA, with $4.46 million transferred to tribe via BB transfer); DX-236 at 1-2 (showing FY1999 "BB" and other inter- and intra-fund transfers of 40% or $134.6 million); 2007

Tr. 888:12-15 (Winter) (noting DX-238 reference to $73 million in "transfers out of the IIM trust fund to tribal trusts").

211. Plaintiffs' proposed finding is argument as to which no response is required.

212-
213. The Court correctly questioned whether an auditor would have "given even a qualified audit if there was any evidence that upwards of 25 percent of the monies collected and intended for IIM account holders was disappearing?" Tr. 1657:6-15 (Court). Plaintiffs misstate the import of qualified audit opinions when they attempt to avoid the Court's question by alleging that, "qualified opinions mean that the auditors did not express any opinion regarding the reliability of disbursement data." Although Mr. Pallais testified as Plaintiffs assert in Pl. PFOF 213, his statement plainly was colloquial in nature and not an authoritative statement regarding audit standards.

There are ten Generally Accepted Auditing Standards (GAAS) promulgated by the American Institute of Certified Public Accountants. GAAS, AU § 150.02 (attached); see, e.g., Grant Thornton, LLP v. Office of the Comptroller of the Currency, 514 F.3d 1328, 1340 n.8 (D.C. Cir. 2008) ("The American Institute of Certified Public Accountants (AICPA) adopted Generally Accepted Auditing Standards to govern the performance of a financial audit." (citing Ferriso v. NLRB, 125 F.3d 865, 871 (D.C.Cir.1997)). Among the ten GAAS are four "Reporting Standards," the fourth of which provides:

> 4. The auditor must either express an opinion regarding the financial statements, taken as a whole, or state that an opinion cannot be expressed, in the auditor's report. When the auditor cannot express an overall opinion, the auditor should state the reasons therefor in the auditor's report. In all cases where an auditor's name is associated with financial statements, the auditor should clearly indicate

> the character of the auditor's work, if any, and the degree of responsibility the auditor is taking, in the auditor's report.

GAAS, AU § 150.02 (emphasis added).

As Plaintiffs explain in this proposed finding, Mr. Pallais testified with regard to a Griffin & Associates audit report dated May 17, 1996, in which the auditors qualified their opinion for four express reasons. AR-633 (Bates 000066-0005-15 to 000066-0005-16). Mr. Pallais testified that the auditor's opinion stated, "[W]e don't know if the financial statements are right or wrong," 2007 Tr. 1842:15-18 (quoted in Pl. PFOF 213), but, in fact, the auditors' report described the nature of their qualifications and then concluded:

> <u>In our opinion</u>, <u>except for</u> the effect on the financial statement of adjustments that might have been determined had we been able to perform adequate audit procedures to verify the financial elements described in the preceding paragraph, <u>the financial statements referred to above present fairly, in all material respects, the financial position of the Tribal, Individual Indian Monies and Other Special Appropriation Funds</u> managed by the U.S. Department of the Interior Bureau of Indian Affairs Office of Trust Funds Management as of September 30, 1995, in conformity with the comprehensive basis of accounting described in [the first paragraph of the report].

AR-633 (Bates 000066-0005-16) (emphasis added).

Mr. Pallais' testimony was simply wrong or hyperbole: if, in fact, Griffin & Associates were saying that they did not know whether the financial statements were right or wrong, as Mr. Pallais asserted, the fourth Reporting Standard under GAAS would have required that they disclaim issuing an opinion, i.e., that they "state that an opinion cannot be expressed." GAAS, AU § 150.02. A fair reading of the audit opinion – or any of the other qualified opinions cited by Plaintiffs in this litigation – plainly does not support the extreme conclusion described by Mr. Pallais, i.e., that the auditor could not state an opinion. See also 2007 Tr:2119:24-2120:1 (Dunne) ("[T]he fact that there are qualified independent audit reports out there does not render the documents that are generated by the entity as unreliable."). To the contrary, the auditors regularly stated their qualifications, in accordance with GAAS, and provided opinions that the financial statements presented fairly the financial position, subject to the qualifications. Thus, no factual basis exists for Plaintiffs' characterization of the qualified opinions, to say nothing of Dr. Palmer's subsequent decision to discount audited and reported disbursements using his 134.1% ratio to reduce them to 74.54% of their reported amounts. Tr. 1619:1-11 (Palmer).

214-215. Plaintiffs' reliance upon Ray Ziler's testimony as support for their position that data from qualified audits should not "override" Mr. Palmer's analysis of information from the CP&R and PACER systems is unjustified. As the Court correctly observed, Mr. Ziler's testimony addressed only the alleged unreliability of data from roughly 20 years ago, and did not advance Plaintiffs' position. Tr. 156:14-157:15 (Court). Even Plaintiffs' Counsel acknowledged that Mr. Ziler's testimony "does not have a direct bearing on how - on what numbers you add up in a column to get to that quantification [of Plaintiffs' claim." Tr. 158:24-159:1 (Counsel).

216. Plaintiffs' proposed finding is argument unsupported by the evidence.

217-219. Plaintiffs' assertion in Pl. PFOF 217 that Defendants' proof that only two-tenths of one percent of the dollars issued in checks are not cashed "is not in evidence" is incorrect. Their reference in Pl. PFOFs 218 and 219 to the "two different time periods" addressed in DX-275 ignores the timing involved in limited pay cancellations. Similarly, Plaintiffs' assertion in Pl. PFOF 219 that the "0.2% figure appears to be a calculation of defendants' counsel" is also unavailing.

The October 2007 testimony of Ron Cymbor, combined with the evidence that he presented, establishes the evidentiary basis for the conclusion that, of checks issued from January 1991 through December 2005, only two-tenths of one percent of the dollars issued through those checks were not cashed. Mr. Cymbor testified that Treasury's CP&R system established that, from January 1991 through December 2005, checks were issued under ALC 4844 in the total dollar amount of $2,812,902.010.36. DX-275; 2007 Tr. 1301:5-1302:23 (Cymbor). Mr. Cymbor also explained that the "limited pay cancellation" of checks occurs after checks have not been cashed within one year of their issuance. 2007 Tr. 1295:6-9 (Cymbor). DX-273, which was created at Mr. Cymbor's direction from information within Treasury's TRAC system, establishes that $5,220,487.65 in limited pay cancellations were transferred to Interior's ALC-4844 from January 1992 through December 2006, a span that begins and ends one year after the January 1991- December 2005 time period during which checks totaling $2,812,902.010.36 were issued. 2007 Tr. 1298:10-1301:4 (Cymbor). Based on this information, Mr. Cymbor testified that it is correct to conclude that, of the over $2.8 billion in checks issued between 1991 and 2005, only approximately $5.2 million worth of those checks were not cashed. 2007 Tr. 1295:6-9 (Cymbor); DX-275. That testimony was not challenged during cross-examination. <u>See</u> 2007 Tr. 1308:8-14 (Cymbor). In addition, as Plaintiffs' PFOF 218, footnote 25, demonstrates, it is undisputed that $5,220,487.65 divided by $2,812,902.020.36 comes out to approximately 0.2%. That is not a "calculation" as much as simple arithmetic of which the Court can obviously take judicial notice.[10] Mr. Cymbor's testimony and documents clearly establish a sound factual basis for the conclusion that 0.2% of the monetary value of checks issued was not cashed. See Defendants' PFOFs 152-157.

Moreover, this evidence and testimony from Mr. Cymbor does not stand in isolation. As described in detail in Defendants' PFOFs 145-147, the Department of the Treasury reviewed a representative sample of 3,255 IIM checks as part of a May, 2000 "Check Study." DX-242 ("Study of Check Negotiation Practices for Office of Trust Funds Management-Issued Checks"). At the conclusion of the Check Study, Treasury noted that the dollar total for the outstanding items within the sample (15 checks canceled

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[10] See Miller v. Federal Land Bank of Spokane, 587 F.2d 415, 422 (9th Cir. 1978) (Ninth Circuit found that district court erred where, after bank had entered into evidence its mortgage contract with the plaintiffs and the figures from a settlement with a railroad, the "court refused the Bank's offer to prove that if one half the settlement, $15,700.00, were applied to the mortgage debt, the total amount of interest to be paid would have been reduced by $4,377.90." The Ninth Circuit held that "[t]his is a matter of mathematics, of which the court could and should have taken judicial notice."); Glenn Coal Co. v. Dickinson Fuel Co., 72 F.2d 885, 889 (4th Cir. 1934) (after reviewing evidence that total coal production in the United States was 2,191,016,256 tons and that coal production from the Black Band Company was 100,000, the court stated that "[i]t is mathematically obvious that the amount of bituminous coal produced from the Black Band seam in West Virginia is almost infinitesimal as compared with the total country-wide production . . . ."); United States v. Santos-Granados, No. CR 07-1439-TUC-FRZ (HCE), 2008 WL 401378, at *3n.3 (D. Ariz. Feb. 12, 2008) (court took judicial notice of the distance traveled by a vehicle: "Pursuant to Fed.R.Evid. 201, the Court takes judicial notice that a vehicle traveling 40 miles per hour will travel 3.33 miles in 5 minutes and of the mathematical equation to determine same (*e.g.* 40 miles / 60 minutes =.66 x 5 minutes = 3.33).").

for limited payability and 12 uncashed checks) "of $2,119.20 seems insignificant at 0.17% of the dollar value of the 2,700 [cashed] checks in the adjusted sample that [totaled] $1,227,013.64." DX-242 at 17.

Similarly, reconciliation work performed by Office of the Special Trustee (OST) in 2004, showed that for FY1999, a period that is one month different from that used for Treasury's Check Study, Interior issued $175 million in IIM checks. 2007 Tr. 886:15-22 (Winter); DX-238 at 1 ("4844 CHECKS" shown in first column of table, referencing IIM disbursing symbol). The "Disbursement Activity" table prepared by OST for IIM accounts in FY1999 shows cancelled checks as a negative disbursement of $364,462.89, DX-238 at 1, making cancelled checks 0.2% of the total amount of checks issued ($175.544 million). The cancelled check line item includes cancellations due to limited payability (uncashed more than one year after issuance) and returned checks. 2007 Tr. 888:19-25 (Winter). This is fully consistent with the facts established by Mr. Cymbor and Treasury's Check Study.

220. Defendants have addressed the flaws in Dr. Palmer's estimate of amounts paid by check which Plaintiffs allege "never left Treasury." See Def. PFOF 136-159.

221. Plaintiffs make no effort to explain how "[t]hese compact discs would likely have resolved any outstanding question posed by this Court about the precise amount of money retained in the TGA. Finally, Plaintiffs never requested the CP&R data on CD, and instead relied on the memoranda in DX-275 for their check-cashing calculations. See supra Response to Pl. PFOF 29 (Plaintiffs had opportunity as early as January 2003 to have searches of the CP&R database performed at cost).

222. Plaintiffs complain that Defendants represented that CP&R and PACER data would be produced and explained at this trial. In fact, Defendants' brief stated our intention to use that information to show that "the average dollar amount associated with electronic transfers is much higher than the average dollar amount associated with check disbursements." Def. Response at 108 (April 9, 2008). Such a limited purpose did not support any expectation by Plaintiffs that we would produce the full PACER and CP&R data on CDs.

223-224. Contrary to Plaintiffs' assertion, Defendants' 0.2% estimate is not "materially inconsistent with other evidence elicited by defendants." Def. PFOF 142 (data on DX-238 indicates 99.98% of check amounts ultimately paid because only 0.2%, i.e., $364,462.89 out of $175,544,960.19, were cancelled and recredited); Def. PFOF 151 (Treasury Check Study, DX-242, found 0.17% checks cancelled or uncashed from a representative sample of checks issued from September 1, 1998 to August 31, 1999).

Furthermore, contrary to Plaintiffs' assertion, DX-275, the chart presented to the Court by Mr. Cymbor at the October hearing, is consistent with DX-272 at 50-51. As the Court will recall, Mr. Cymbor's chart listed only the number of checks transferred to Interior's ALC 4844 as a result of "Limited Payability Cancellations," because those checks were not cashed within one year after they were issued. DX-275. Plaintiffs ignore this limited subject matter of DX-275. The number of checks cancelled from January 1992 to December 2006 as "Limited Payability Cancellations" was 46,197. DX-275. On pages 50 and 51 of DX-272, the checks cancelled due to Limited Payability are identified by Check Status Code L. The number of checks listed under Check Status

Code L (checks that were not cashed within one year and for which the issuing agency received credit for the amount of the check) for the period 1992 through 2002 was 28,354. DX-272 at 50-51. This number is consistent with Mr. Cymbor's representation that 46,197 Limited Pay Cancellations occurred from January 1992 through December 2006, a period that is four years longer.

Plaintiffs' representation that there were 286,661 checks cancelled from January 1992 to December 2002 ignores the limited subject addressed in DX-275 and erroneously adds checks within Check Status Codes L, U, Z, and D together from DX-272, pages 50 and 51, to compare that total number to the number of Limited Payability Cancellations shown in DX-275. Plaintiffs are comparing apples to oranges, and the faulty comparison does not support their position.

225. The 0.2% check cancellation rate is evident from DX-275, DX-242 and DX-238. Plaintiffs' reliance on Dr. Palmer's analysis of CP&R summary tables during the weekend before his rebuttal testimony is not sufficient to rebut Defendants' well-established documentation.

II. FURTHER RELIEF

A. Benefit obtained by the government

1. The government has not benefitted from the use of IIM trust funds

226. Plaintiffs incorrectly assert that the evidence shows the government benefitted significantly from an alleged improper holding and use of IIM trust funds. Their assertion that "funds remained in the TGA or otherwise have been available to the

government at all times relevant to this litigation" is not followed by any supporting citations to the record and is, in fact, contrary to the record evidence.

Plaintiffs concede that their "two primary witnesses" on this issue were Richard Gregg and James C. Miller, III. Plaintiffs chose not to call Mr. Gregg to testify at the June 2008 trial, Tr. 1365:10-14; 1367:14-19 (Plaintiffs' counsel), and his general testimony from nine years ago, 1999, does not advance Plaintiffs' case. Furthermore, Dr. Miller testified repeatedly that he was "not testifying to any particular amount," and that Plaintiffs' calculation of a $54 billion benefit to the government "was prepared under certain assumptions on which I can not verify. I do not have requisite information to verify the numbers." Tr. 218:20-25 (Miller). He stated candidly that "I can't comment on the actual data, the actual amounts, the net amounts that were retained by the government. I do not have that knowledge." Tr. 219:2-4 (Miller); see Tr. 222:25-223:2 (Miller). Dr. Miller further acknowledged, in response to questions from the Court, that he does not have any personal knowledge regarding the government's day-to-day borrowing decisions, but was only offering what he viewed to be a theoretical, "strategic" position. Tr. 252:12-253:9 (Miller).

227. The testimony of Mr. Gregg cited by Plaintiffs does not, as Plaintiffs assert, bear "directly upon the calculation of benefits conferred, and advantages gained, by the government." Instead, it merely confirms that the IIM account at Treasury is a deposit fund account and that "Treasury's role" with respect to the IIM account is "essentially the same" as the approximately 12,000 other accounts Treasury has. This is consistent with the testimony of Defendants' witnesses. Tr. 1159:8-11; Tr. 1160:21-25 (Hoge); Tr.

1230:21-25 (Grippo); Def. PFOF 364-365.

228. Mr. Gregg's general assertion that "we treat the IIM account like any other funds that come into Treasury, really without distinction" does not support Plaintiffs' allegations that the government derived benefits through the improper holding of IIM monies. This is especially true when it is understood that Mr. Gregg was responding to a question regarding how IIM cash coming into the TGA was "used to pay off obligations that are due." 1999 Tr. 3396:20-3397:4 (Gregg). As Mr. Grippo testified, although the amount of cash coming into the TGA from the IIM System is relatively small, that does not mean that Treasury ignores those cash amounts because every dollar that comes into the TGA is accounted for on a daily basis. Tr. 1246:22-1247:4 (Grippo); Def. PFOF 365.

231-
232. Plaintiffs have mis-characterized Mr. Gregg's testimony about benefit. The question Mr. Gregg answered pertained to Treasury's miscellaneous receipt account, not Treasury's General Account. The question was part of a series of questions on miscellaneous receipts accounts, beginning with this question: "Sir, are you familiar with miscellaneous receipts accounts?" Phase 1 Tr. 3312:19-20 (July 7, 1999 Gregg). The miscellaneous receipt account holds "deposits from government agencies that in some cases the agency may not know where else to put the funds if it's somehow unidentified." Phase 1 Tr. 3313:2-5 (July 7, 1999 Gregg). The benefit Mr. Gregg refers to is the use of these miscellaneous receipts, not individual Indian money.

Mr. Gregg's general testimony that, "at least at the margin, the more that's collected and within the various accounts within Treasury, the less Treasury has to borrow," Phase 1 Tr. 3315:17-19 (July 7, 1999), does not support Plaintiffs' assertion.

Interpreted in a light most favorable to Plaintiffs, that testimony states no more than, in theory, cash receipts could possibly have some influence on borrowing decisions. But Plaintiffs in 1999 did not elicit testimony from Mr. Gregg on whether the real world borrowing activities at Treasury confirmed that theory, and they did not call him in June to address the actual facts on Treasury's borrowing practices. They also did not ask Mr. Gregg whether the amounts collected into the IIM system were large enough to affect borrowing decisions.

As was made clear by Mr. Grippo, borrowing decisions of the federal government are not made "at the margin." Instead, Treasury borrows in billion-dollar increments, that is, determinations are made to increase or decrease the borrowing by at least one billion dollars. Tr. 1242:13-17 (Grippo). The presence or absence of IIM cash receipts, particularly amounts left after netting out disbursements and investments, would have no effect on whether, or how much, the government would decide to borrow. Tr. 1244:13-23 (Grippo); DX-503. Moreover, Treasury does not consider general ledger fund accounts or the fund balance of a deposit fund, such as 14X6039, in making borrowing decisions. Instead, borrowing decisions are derived from projections regarding operating cash levels. Tr. 1265:6-16, 1267:12-1268:11 (Grippo); see Def. PFOF 406-418.

237-240. Dr. Miller's general testimony that the government benefits from monies coming into the TGA because the government does not have to borrow that amount of money does not support Plaintiffs' claim for the same reasons that Mr. Gregg's testimony is unavailing. See Def. PFOF 406-418.

Moreover, Dr. Miller was candid in informing the Court that he does not possess knowledge about the borrowing decisions made within the Department of the Treasury:

> THE COURT: . . . . My question to you is whether you know as a matter of fact, either by your own personal knowledge or because of your expertise, that when the government makes those day-to-day borrowing decisions that you've been talking about, they in fact do include in the calculus money that is on deposit in commercial banks.
>
> THE WITNESS: Good question, judge. I do not have that knowledge, personal knowledge of that. It seems very reasonable that they would be considered, but I do not have such personal knowledge.
>
> THE COURT: All right. And the same basic question applies to this discussion of deposit funds that we've had. You say there's a difference between funds and accounts. Do you know, either of your own personal knowledge or based on your expertise, that when the government makes those day-to-day borrowing decisions that you're talking about, that in fact they include money that is in deposit funds like this 14X-6039 when they're deciding how much money they have on hand?
>
> THE WITNESS: I haven't -- Your Honor, I haven't talked with the people who make these day-to-day decisions. I haven't been involved with the tactics, as I've described. I was more at a strategic level.
>
> THE COURT: But again, it sounds reasonable?
>
> THE WITNESS: It sounds very reasonable. In fact, monies that come in, the people who are looking and making these daily decisions recognize, well, you've got to pay Social Security checks -- I mean, a lot of the monies that come in in a sense are owned by other people, or they're already spoken for, and so you're looking at this total volume of funds that are available and making the decisions about how much you need to borrow. I mean, they're day-to-day decisions about how much to borrow, and if you have extra, then you don't have to borrow that.
>
> THE COURT: It would be fair to say, then, Dr. Miller, that your testimony is sound theoretically, it's sound economics, it's sound common sense, but you don't have any personal knowledge of the mechanics of how these day-to-day decisions are made?
>
> THE WITNESS: I do not have such personal knowledge, no.

Tr.252:12-254:2 (Miller). Without this first-hand knowledge, there is no basis to credit Dr. Miller's fact or opinion testimony.

241. Neither Mr. Gregg nor Dr. Miller quantified any alleged benefit to the government. Dr. Miller specifically testified that he was "not testifying to any particular amount," and that Plaintiffs' calculation of a $54 billion benefit to the government "was prepared under certain assumptions on which I can not verify. I do not have requisite information to verify the numbers." Tr. 218:20-25 (Miller). He conceded that "I can't comment on the actual data, the actual amounts, the net amounts that were retained by the Government. I do not have that knowledge." Tr. 219:2-4 (Miller); <u>see</u> Tr. 222:25-23:2 (Miller).

242-247. The cited testimony of Mr. Kenneth Carfine is consistent with the testimony of Defendants' witnesses and does not support Plaintiffs' allegation that the government benefitted significantly from the alleged improper holding and use of IIM trust funds within the TGA.

248. Plaintiffs assert inaccurately that Defendants tried to "counter" the testimony of Mr. Gregg, Dr. Miller, and Mr. Carfine on the subject of cash receipts and borrowing practices of the federal government. All of these witnesses merely support the undisputed fact that IIM cash receipts go into the TGA, but none testified regarding actual borrowing decisions made by the Department of the Treasury.

255. Plaintiffs attempt to bolster their theory with a partial quote from the 2009 Budget to the effect that deposit fund balances (and IIM is such a fund) are "available to finance expenditures and are a means of financing other than borrowing from the public." (quoting PX-139 at 6). The exhibit actually says, "To the extent they are not invested, <u>changes in</u> the balances are available to finance expenditures and are a means of

financing other than borrowing from the public."   PX-139 at 6 (emphasis added). This quote merely expresses the undisputed fact that "changes in" deposit fund balances, i.e., cash receipts, "are available" as a means of financing. It does nothing to disprove the fact, established through Mr. Grippo's testimony, that net, uninvested IIM cash receipts positively do not influence borrowing decisions.

2. The Out of Balance Condition Between Treasury and Interior Was Resolved And Does Not Help Explain how Improperly Withheld IIM Trust Funds Result in Significant Benefits to the Government

256. Mr. Winter testified that the $4 million out-of-balance condition between Treasury and Interior had been resolved in 2004, 2007 Tr. 906:5-6 (Winter), and was due to a reporting difference, 2007 Tr. 907:7-9 (Winter). Regarding the difference between the general ledger and subsidiary ledgers for the IIM system, this Court cited Mr. Winter's testimony in noting that Interior "has reduced this out-of-balance condition to the point where the current aggregate out-of-balance condition is $5.2 million, and that that balance discrepancy results in $5.2 million more in beneficiaries' accounts than the total of funds in the asset pool for investment." Cobell XX, 532 F. Supp. 2d at 74 (citations omitted).

258. Plaintiffs ignore the elimination of the out-of-balance condition between Interior and Treasury by referencing out-dated May 2003 testimony of Paul Homan, who has not worked at Interior since January 1999. 2007 Tr. 1583:4-11 (Homan).

259. Plaintiffs in this proposed finding continue to reference the Treasury-Interior out-of-balance condition resolved in 2004, 2007 Tr. 906:5-6 (Winter), by citing excerpts from their "Compilation," PX-65, from reports dated 1952, 1983 and 1995.

262. The 2004 resolution of the out-of-balance condition that once existed between Treasury and Interior, 2007 Tr. 906:5-6 (Winter); the meticulous daily reconciliation work performed by OST (and previously BIA) of Interior and Treasury transaction data; Def. PFOF 326-328; and detailed monthly reporting of IIM system transactions to Treasury, Def. PFOF 329-336, all undermine Plaintiffs' conclusion that "neither Treasury nor Interior know how much IIM is in the government's coffers, and the available records are inaccurate and out of balance."

3. Plaintiffs' Calculation of Benefits to the Government Reaped Is Not Reasonable

263-264. Plaintiffs have not alleged that Professor Cornell and Dr. Palmer have any experience in making borrowing decisions for the U.S. Treasury. To the extent Plaintiffs offer their testimony to prove that IIM cash receipts are considered in federal government borrowing decisions, they are flatly contradicted by Mr. Grippo, who is personally involved in the relevant decision-making process. See Tr. 1244:13-23 (Grippo).

Plaintiffs' claim relies upon the theory that cash balances assessed in the course of making borrowing decisions are comprised of many individual sums, including IIM cash. This reasoning is inapposite, however, because the issue is not whether all sums the government receives influence borrowing decisions but only whether those decisions would be any different without one of those sums, which happens to be a relatively small amount that does not influence whether or how much the federal government borrows.

265. Plaintiffs conflate "funds" and "cash." Regardless of the merits of Plaintiffs' claims regarding undisbursed "funds," their model erroneously assumes that the

government has also withheld "cash" equivalent to the allegedly withheld fund balances, and that the withheld cash remains in the TGA indefinitely. Plaintiffs' quantification of the alleged benefit to the government is wholly dependent on the correctness of their withheld-cash assumption. However, this assumption is flatly contradicted by Mr. Grippo, who testified that TGA cash is spent virtually the same day it is deposited. Tr. 1231:1-3 (Grippo).

266. Plaintiffs' model fundamentally errs in assuming that IIM fund balances in commercial banks are available to the Treasury. This is categorically refuted by Mr. Grippo's testimony. Tr. 1245:24-1246:13 (Grippo).

267. Relying upon Dr. Palmer's testimony, Plaintiffs attempt to justify their benefits model's failure to adjust for IIM held in banks by theorizing that that fact is irrelevant. Dr. Palmer appears to equate subtracting the aggregate amount of IIM account balances at the end of the benefits calculation period with offsetting benefits erroneously included in that calculation based upon IIM held in banks. Tr. 1510:5-9 (Palmer). However, no relationship is established (or in fact exists) between those balances, which no one disputes belong to certain IIM account holders, and IIM held throughout history in banks outside of Treasury. Dr. Palmer also theorizes that the inclusion of bank balances in the benefits calculation does not matter where IIM was transferred from banks to Treasury because Treasury subsequently would derive a saved-borrowing benefit from the interest earned while the IIM was previously on deposit in banks outside of Treasury. Tr. 1511:4-18 (Palmer). However, even assuming the accuracy of any assumption about subsequent use of earlier earned interest, Plaintiffs fail to justify the inclusion of principal

held outside Treasury in their model's calculation of saved borrowing costs in earlier years.

268. Plaintiffs' citation to Tr. 1130:1-4 (Kehoe) does not support their contention that "no attempt was made by Dr. Kehoe to aggregate totals even when such information may have existed." That testimony reads: "Q: And you didn't go and, say, add up a number of different numbers from various [sic] to try to make up an aggregate total, you only used those summary aggregate numbers? A: That's correct." Tr. 1130:1-4 (Kehoe). This exchange shows that Dr. Kehoe used only summary aggregate numbers, but there is no indication in that quote that some other "such information may have existed," much less what "such information" was, which Plaintiffs imply Dr. Kehoe should have used instead.

Likewise, Plaintiffs claim that "Dr. Kehoe's calculations are <u>highly suspect by his own concession</u>," (emphasis added), but the quoted transcript, Tr. 1113:5-17 (Kehoe), contains no such concession by Dr. Kehoe, much less one stating his "calculations are highly suspect." Similarly, it is not true that, "<u>[b]y his own admission</u>, Dr. Kehoe made no assessment of, and cannot attest to, the reliability of the information he reports for any period of time." Pl. PFOF 268 (emphasis added). Stating that he had not reviewed "<u>background documentation</u>, <u>back-up documentation</u>," Tr. 1140:12-18 (Kehoe) (emphasis added), does not equate to "admitting" that he did not assess, and cannot attest to, the "accuracy of the information he reports for any period of time."

269. Plaintiffs misleadingly characterize Dr. Kehoe's testimony in this proposed finding. First, rather than "attempting to suggest" that bank investments were handled

outside of Treasury, Dr. Kehoe clearly stated that, “based on the research I’ve done, Treasury really had no involvement in placing IIM in banks.” Tr. 1098:5-7 (Kehoe). Next, rather than giving an “initial” opinion that funds listed as “IIM System Funds in Banks” were not covered in Treasury, Dr. Kehoe re-emphasized it, after the cited cross-examination regarding 14X6039: “I know that if these funds are invested in bank CDs they’re not held by the Treasury, they’re in these bank CDs belonging to commercial banks.” Tr. 1100:2-4 (Kehoe). Finally, far from making a “concession” “undercut[ting] defendants’ . . . claim that . . . the government could have obtained no benefit,” all Dr. Kehoe acknowledged was, “I’m not sure exactly how at the Department of the Treasury in 6039, how this was accounted for.” Tr. 1099:20-21 (Kehoe).

270. Plaintiffs provide no support for the allegation that “Dr. Kehoe admitted that funds are deposited at Treasury, but are invested in certificates of deposit in Treasury’s or Interior’s agent banks, just like all other Treasury funds.”

During his testimony, Dr. Kehoe never used the term “agent banks.” It is also untrue that “Dr. Kehoe admits that his knowledge is insufficient to be sure when and how funds enter the Treasury Department.” Rather than “admitting” ignorance of “when and how funds enter the Treasury Department,” the transcript cited by Plaintiffs, Tr. 1102:4-15 (Kehoe), reveals Dr. Kehoe acknowledged his lack of familiarity with the TGA. In fact, Dr. Kehoe exhibited a certain understanding of “when and how funds enter the Treasury Department”: “Q: These funds come into the Department of the Treasury through various commercial banks that are where deposits are made and they are then credited to Treasury accounts, correct? A: They would be credited to the 6039 account at the Treasury." Tr. 1101:25-1102:3 (Kehoe).

Though Dr. Kehoe uses the term "IIM System Funds" in his chart to be consistent with other experts, Tr. 1095:14-15 (Kehoe), Dr. Kehoe felt comfortable with that term because "I have always thought of it and originally used that descriptor in banks." Tr. 1095:21-22 (Kehoe). Therefore, Plaintiffs' assertion that "[p]rior to that point Kehoe did not use the term 'IIM system' to describe the funds," is wrong.

272. Plaintiffs overstate Dr. Kehoe's testimony that the GAO considered IIM "public monies." The report Dr. Kehoe was addressing is dated 1928, PX-134 at 2, and Plaintiffs presented no evidence indicating that the GAO, or anyone else, considered IIM "public monies" in other years. To the contrary, Dr. Kehoe referred to "correspondence from the Treasury Department from an earlier period in which it stated that in their view, IIM were not public monies." Tr. 1142:12-15 (Kehoe). Therefore, Plaintiffs' allegations that "[t]his means the government has treated IIM funds as its own" and that Treasury considered IIM funds held in commercial banks during this period in making debt decisions or used them to reduce borrowing costs are not supported by Dr. Kehoe's testimony.

273. Plaintiffs claim that "funds held 'in hands of disbursing officers' are funds held by the Treasury Department." Dr. Kehoe testified that he had "not been able to determine exactly what that phrase means . . . [but that] it's quite likely that refers to IIM that was kept in Treasury checking accounts." Tr. 1079:23-25 (Kehoe). He later added, "[E]ach BIA disbursing agent was assigned a disbursing agent symbol, and that meant that they had a checking account which they could use for disbursing money under their

supervision." Tr. 1137:18-24 (Kehoe). With such "Treasury checking accounts" referring to accounts under the supervision of BIA disbursing agents," it is incorrect for Plaintiffs to claim that "funds held 'in hands of disbursing officers' are funds held by the Treasury Department."

275. Plaintiffs assume an "unjust enrichment figure" for the government, yet provide no evidence to support their claim of unjust enrichment. Dr. Kehoe certainly provided Plaintiffs no such evidence.

4. The Ten-Year Bond Rate

276-279. Plaintiffs fail to justify using 10-Year Bond Rates to estimate the alleged cost of government borrowing for purposes of their benefits model. Assuming that, in the absence of IIM receipts, the government would sell a security to provide operating cash, the amount of interest that would be paid on that security would provide the measure of the savings or benefit realized from having IIM receipts available. Tr. 1250: 5-7 (Grippo).

Plaintiffs use the 10-Year Bond Rate to calculate the size of their claim because it is "in the middle range of Treasury's interest rates." Pl. PFOF 276 (citing Dr. Miller). However, the fact that one term might fall in the middle range of a set of terms of government securities does not mean, for example, that it represents the term of security most commonly used by the government or that most of the money the government has borrowed historically has been through the sale of 10-year bonds. While Professor Cornell testified that the 10-year rate is a reasonable approximation of the government's borrowing costs, Pl. PFOF 277 (citing Professor Cornell), Plaintiffs did not present any statistics to support that opinion.

In any event, for purposes of selecting an appropriate interest rate, Plaintiffs fail to place in context the amount of dollars the government might need to borrow if borrowing were necessary at all to make up any alleged cash shortfall that would be created without IIM receipts coming into the Treasury. As Mr. Grippo testified, due to the relatively small size of incremental borrowing that would be needed to replace the IIM cash (if it were unavailable and Treasury needed to make up the resulting cash deficit), Treasury would sell a short-term, even a very short-term, debt instrument. Tr. 1248:1 – 1249:23 (Grippo). Ten-year bonds obviously do not meet such criteria.

280. Mr. Rosenbaum's testimony does not support Plaintiffs' claim. Mr. Rosenbaum did not "confirm[] that [the ten-year Treasury bond] rate is reasonable." His testimony repeatedly referenced only "six-month T-bill" rates used by Ernst & Young for comparison to interest paid on the IIM accounts that Ernst & Young studied for their Paragraph 19 work. Tr. 1417:13-1418:17 (Rosenbaum). In addition, Mr. Rosenbaum's testimony dealt with investment yields to Plaintiffs, not the cost to the government, and it is the latter that is supposedly the benchmark for Plaintiffs' restitution claim. See Tr. 67:6-19 (Laycock).

III. PLAINTIFFS ARE NOT ENTITLED TO SPECIFIC RELIEF

281-283. Plaintiffs' suggestion that the aggregate throughput analysis for the IIM System constitutes "a reconciliation process for individual Indian money accounts" which, under 25 U.S.C. § 4012(1), might trigger an interest obligation is fallacious. As the quoted language itself states, the relevant process is a reconciliation of individual accounts, not of aggregate throughput. This characterization of Interior's accounting duties is reflected throughout the 1994 Act. See, e.g., 1994 Act §§ 303(b)(2)(A) (defining Special Trustee's duties: "Monitor reconciliation of trust accounts.-The Special Trustee shall monitor the reconciliation of tribal and Individual Indian Money trust accounts to ensure that the Bureau provides the account holders, with a fair and accurate accounting of all trust accounts."); and 304 (requiring Secretary to submit "a report identifying for each tribal trust fund account" which "shall include - (1) a description of the Secretary's methodology in reconciling trust fund accounts;" and attestations by each account holder that "(a) . . . the account holder accepts the balance as reconciled by the Secretary; or (B) the account holder disputes the balance of the account holder's account as reconciled by the Secretary and statement explaining why the account holder disputes the Secretary's reconciled balance;"). Interior's ability to provide such a reconciliation for IIM accounts was the subject of the October 2007 hearing and, as a result, this Court's January 30, 2008 Opinion repeatedly refers to Interior's attempted reconciliation of IIM accounts. The Court ultimately determined that such a reconciliation is impossible and this latest proceeding thus was intended to determine "an appropriate remedy," Cobell XX, 532 F.Supp.2d at 103, for Interior's inability to provide the reconciliation – not the reconciliation itself.

285-
286. Plaintiffs' assertion that 25 U.S.C. § 4012(1) is applicable to this case is legally and factually incorrect. There is no basis for Dr. Palmer's "alternative analysis."

287. There is no indication in the transcripts that Dr. Kehoe reported any interest rates, as Plaintiffs claim. Pl. PFOF 287, n.32.

288-
290. Dr. Palmer's analysis of specific relief is not reasonable, for the reasons set forth above in response to Plaintiffs' PFOF 285-289 and in Defendants' Proposed Conclusions of Law 53-56.

IV. ALTERNATIVE MODELS

After the presentation of evidence in the June 2008 trial, the Court posed four questions concerning Dr. Palmer's spreadsheet. Tr. 1743:8 -1744:1 (Court). Plaintiffs have responded to the four questions and added an additional new model purporting to show what the result would be if simple interest were used instead of the compound interest reflected on PX-189. The interest model does not use the 10-year Treasury rate but a blended rate from an "alternative model" Plaintiffs presented in rebuttal. Because these hypothetical models are offered after the close of the evidence, they cannot properly be fully considered now. Plaintiffs fail to indicate who even created the new models. An examination of the new models, however, leads to the conclusion that they are neither relevant nor helpful.[11]

The Tribal IIM model is flawed in concept and execution. The Osage model does not answer the question of what would happen if all the payments to annuitants derived

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[11] As noted in our discussion of Plaintiffs' responses to the Court, in some instances Plaintiffs apparently have made substantive changes to the data underlying the calculations previously set forth in PX-189. Defendants respectfully note that if the Court is inclined to consider such "new" evidence, it should reopen the record. See generally Ledoux v. District of Columbia, 820 F.2d 1293, 1305 (D.C. Cir. 1987) (upon remand, "[t]he trial court may base this factual determination on evidence already in the record, or, if necessary, it may reopen the record for the introduction of additional evidence."). This will allow Defendants the opportunity to develop the record fully regarding Plaintiffs' new calculations through examination of necessary witnesses and the introduction of any necessary exhibits.

from Osage headright revenues were “backed out.” The model developed to reflect the sensitivity of the model to changes in the “75%” disbursement rate calculation fails to answer this question. The model designed to test the sensitivity of PX-189 to changes in the “check clearing” rate partially answers the question but reinforces the conclusion that using only CP&R and EFT data to determine disbursement rates is not reasonable. Finally, the “simple interest” model differs from the other hypothetical models in that it does not limit itself to changing one discrete factor, that is, using simple interest instead of compound interest. Instead of simply changing to simple interest, it also replaces the 10-year Treasury Bond rate used to approximate government “avoided borrowing costs” with an interest rate that seems more appropriate to a damages model establishing the “imputed interest” lost by Plaintiffs rather than an unjust enrichment by Defendants.

a. Attachment Tribal IIM (Exhibit "A")

294-295. At the outset, it should be noted that the issue of “Tribal IIM” is not an issue with respect to Defendants’ model because DX-371 is designed to count all collections coming into the IIM System, including all Tribal IIM, and to count all disbursements going out of the IIM System, again including all disbursements of Tribal IIM. Whether the Tribal IIM amount in Column E of DX-371 is 2%, 10% or 15% of revenues, the Total Collections figure in Column G of DX-371will remain unchanged. The Disbursements figure in Column H of DX-371 would not change because it already includes all disbursements, including Tribal IIM.

The “illustration” contained in Plaintiffs’ PFOF 294 is misleading and, because of its construction, cannot answer the question posed by the Court. An accurate answer to the Court's question regarding Tribal IIM would have to address the effect of Plaintiffs' failure to include in their calculations the disbursements of Tribal IIM through bookkeeping transfers. If Tribal IIM comprises 10-15% of total collections, the effect of Plaintiffs' failure to account for the disbursed Tribal IIM will be greater than if Tribal IIM comprises only 2% of total collections. However, Plaintiffs incorrectly removed 2% of the estimated funds from <u>both</u> "revenues" (or collections) <u>and</u> the disbursements. Pl. PFOF 295. This error arises from Plaintiffs' false assumption that a Tribal IIM disbursement to a tribe occurs only through the issuance of a check that would have to be "removed from the CP&R data" (as illustrated through Plaintiffs' example). As explained above, Response to Pl. PFOF 23, 82, 209-210, bookkeeping transfers, such as "BB" transfers of Tribal IIM funds, are not included in the CP&R system data. Therefore, there is no justification to remove 2% of the funds from the disbursement side of the equation, as Plaintiffs have done, without proof that Plaintiffs' disbursement calculations captured Tribal IIM disbursements.

Thus, for the two years identified in Plaintiffs' illustration, Pl. PFOF 294, their assertion that $20 should be subtracted from the disbursement side of the ledger if there is a reduction of $20 from the revenue side is wrong. In their hypothetical, Plaintiffs' disbursement figures were already artificially low because Dr. Palmer failed to account for all Tribal IIM disbursements originally, having developed his disbursement figures directly from the CP&R data in Attachment C, without consideration of BB transfers. On the collections side, because Plaintiffs' computations make no effort to exclude Tribal IIM money at all, it would be appropriate to subtract $20 just from the revenue side in their example. This deduction would appropriately remove Tribal IIM from the revenue side to correspond better with the exclusion of Tribal IIM disbursements embedded in Plaintiffs' total disbursement calculation. See Tr. 1633:17-1634:19 (Court and Palmer).

296-298. Because Plaintiffs' Exhibit A is based on a flawed premise, their model can only be interpreted as an answer to the question "What happens if you subtract the same sum from both sides of an equation?" In PX-189-A, Plaintiffs calculate "Nominal Benefit" by subtracting Disbursements from "Corrected Revenues" (Column E minus Column G). In their Exhibit A to their proposed finding, Plaintiffs attempt to recalculate "Nominal Benefit to Government" by subtracting "Net Disbursements" and the 2% Tribal IIM figure from "Corrected Revenues" (Column F minus the sum of Columns H and I). However, Column F on Exhibit A already does not include the "2% Tribal IIM" figure from the Revenue figure contained in Column E of PX-189-A.[12] On the Disbursement side of Exhibit A, Column J ("Nominal Benefit") is the same as PX-189's "Nominal Benefit" (Column G) less the same "2% Tribal IIM" as was subtracted from the Revenue figure on Exhibit A. The result is that the total Revenue figure is reduced by the 2% of the Tribal IIM figure and the total disbursement figure is reduced by the exact same 2% of the Tribal IIM figure.

Even if Plaintiffs' attempt to provide an answer to the 2% hypothetical were not

[12] This is confirmed by the formula appearing under the "Corrected Revenues" column on Exhibit A. It defines Column F as being Column B minus Column C plus Column D minus Column E. Column B is the Corrected Revenues from PX-189-A; Columns C and D pertain to Osage; and Column E is the 2% Tribal IIM amount. Thus, Plaintiffs deduct the Tribal IIM from their Corrected Revenues amounts on Exhibit A.

flawed in construct, it fails because it does consider actual data for years after 1985. The Court's question relates to Dr. Angel's estimates of Tribal IIM (posing as a hypothetical that his estimates were too high); however, Ms. Herman used Dr. Angel's estimates only between 1934 and 1985. For the years 1986 to 2007, the Tribal IIM figures are calculated from IRMS/TFAS data and are not based upon Dr. Angel's estimates. To conform Plaintiffs' Exhibit A hypothetical model to these undisputed facts and change only those Tribal IIM figures that are dependent on Dr. Angel's estimate, the 2% Tribal IIM figure should not have been used for the years 1985 to 2007.[13]

Surprisingly, and contrary to Plaintiffs' assurance that "no other changes" were made except for (1) the addition of a column representing the "2% Tribal IIM" hypothetical on the revenue side and (2) representing the "2% Tribal IIM" hypothetical on the disbursement side and reflecting that change in "Net Disbursements" (Column I), some other change had to have been made because annual disbursement figures change between PX-189-A and the new Exhibit A. While the total Revenues figure at the bottom of Exhibit A exactly matches the total Revenues figure on PX-189-A, the total Disbursement figures do not match. Compare Column F, PX-189-A ($10,674.94 million) with Column G, Exhibit A ($10,515.22 million).

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[13] Calculating Tribal IIM as 2% of total revenues for the years 1986 to 2007 would total approximately $120 million; however, the amount of Tribal IIM indicated for that same time period in DX-371 exceeds $192.9 million.

b. Attachment Osage (Exhibit "B")

300-303. We note initially that “all payments to [O]sage annuitants” should not be “backed out” because a portion of them, reflected in DX-371, did enter the IIM System. Plaintiffs’ error was including virtually all Osage headrights payments as collections when, in fact, a substantial share of these funds never entered the IIM system.

Plaintiffs’ effort to answer the Court’s hypothetical concerning the effect of excluding Osage headrights monies that do not enter accounts for IIM account holders is still flawed. Comparing, for purposes of illustration, the 1980 figures in PX-189-A with the corresponding 1980 figures in Plaintiffs’ new Exhibit B, the “Osage Removal” model, what Plaintiffs have done becomes clear. The “Osage Removal” model reduces the revenue side by $51.59 million, reducing PX-189's “Corrected Revenue” figure of $525.89 (already inflated by adding the Osage revenue that goes from the Osage Tribe’s account to headright owners directly) to the $474.30 figure which only includes the Osage headright revenues going to individual IIM accounts. Pl. Ex. B, Column E (1980). However, Plaintiffs then, in Column G, reduce the disbursement side of the “Osage Removal” model by the exact same $51.59 million, resulting in no net difference. Pl. Ex. B, Columns G and H (1980).

The fault with this analysis is the subtraction of an amount of revenues from disbursements that was never actually in the IIM system to be disbursed in the first place. The “Osage Corrected” revenues (found in Column D, PX-189-A) were never included – and never should have been included – in the total collections figures reflected on DX-371. Plaintiffs appeared to explicitly recognize this when they increased the “Revenue” figures (Column B, PX-189-A) by adding “Osage Corrected” amounts (Column E, PX-189-A). There is no evidence that Plaintiffs augmented disbursements to reflect these additional fund flows. If the “Osage Corrected” revenues were never in the Column B “Revenues” and are not in the Column E “Corrected Revenues” in the “Osage Removal” model, they cannot properly be subtracted from disbursements to get the “Net Disbursements” shown in Column H of the “Osage Removal” model. The “Net Disbursement” figure in Exhibit B is derived from the disbursement figure in DX-371, and this figure in DX-371 never included the “Osage Corrected” monies because those monies never entered the individual IIM accounts. In short, one cannot disburse funds which never entered the IIM system.

Thus, Plaintiffs’ bottom line answer to the Court’s Osage headrights query is that nothing changes. Compare the Accumulated Benefit Conferred Minus Reported Trust Balance figure on PX-189 ($46,851.21 million) with the Accumulated Benefit Conferred Minus Reported Trust Balance figure on the Osage Removal model (Exhibit B) ($46,851.21 million). That simply cannot be correct.

Professor Cornell’s estimate of the difference is far closer to the correct answer. He estimated that since the nominal dollar difference in PX-41 "Osage, Gov't Calculated" and "Osage, Corrected" was "about 900 million [dollars]" and that this represented "about twenty percent" of the total nominal benefit calculated in PX-41, the effect upon his "Accumulated Benefit" calculation was in excess of $11 billion. Tr. 334:24-335:21 (Cornell). See Def. PFOF 72.

c. Attachment Disbursement (Exhibit "C")

304-
307. Plaintiffs' attempt to answer the Court's question about their use of a "75 percent" disbursement rate provides only a partial answer. A comparison between the "Disbursements," Column F, PX-189-A, with the corresponding Column F in the "Attachment Disbursment" spreadsheet (Exhibit C to Plaintiffs' proposed findings), reveals that the figures for the period 1988-2002 do not change.

For the years 2002-2007, identified by the Court as having disbursement figures in PX-189-A that are "almost self-evidently way off," Tr. 1743:22-23 (Court), Plaintiffs derive the disbursement figures by dividing the DX-371 disbursement figures by a factor of 1.34 to "correct" for their flawed position that, in these years, disbursements derived from audit reports were overstated by 134% when compared to figures derived solely from CP&R and EFT data (excluding all other types of disbursements, including but not limited to, "BB" transfers).[14] This mistaken assumption caused the disbursement rate figures to be, in the words of the Court "way off." However, Plaintiffs' Exhibit C does not address the root cause of the erroneous figures: the baseless assumption that disbursements from the IIM system are limited to checks and electronic fund transfers.

By limiting their disbursements calculation adjustments to those calculations that use a percentage or a factor correction, Plaintiffs have failed to make adjustments for

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[14] Year 2002 disbursement figures are not divided by 1.34. Year 2002 is included in the years used to calculate the disbursement rate based upon CP&R and EFT data.

1988-2002, the very years from which the faulty disbursement rates are derived.[15] For example, in 1990, the rebuttal model (PX-189-C) calculates a disbursement rate of 58.7% based upon $202,159,678 in CP&R and EFT disbursements and $340,094,234 in "Corrected Revenues" from PX-189A. The PX-189-A figures for 1990 reflect disbursements of $202.16 million (Column F) and a Nominal Benefit to the Government of $137.93 million (Column G). Columns F and G in Plaintiffs' new Exhibit C contains the same respective figures for 1990. This pattern holds true for 1988 through 2002.

Thus, even though the adjustments made in Exhibit C were made in response to the Court's observation that calculating a disbursement rate using only checks and EFT led to erroneous results, Plaintiffs do not adjust the disbursement figures most directly implicated by their faulty assumptions, i.e., the period between 1988 and 2002. (Audited IIM figures were available for 1996 through 2007; see DX-371, 371-00003, Note on Column H). For comparison purposes, the adjustments made in the period 2003-2007 result in an increase of $352 million, or 34% (from $1.033 billion to $1.385 billion) in disbursements in just five years. A similar percentage increase in disbursements for the period 1988 to 2002, would result in another nominal increase in disbursements of $995 million.

d. Attachment Canceled Check (Exhibit "D")

308. Plaintiffs' Exhibit D purports to answer the Court's question as to "how sensitive the spreadsheet analyses are to a different check cashing or check clearing number. Tr.

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[15] In contrast to most years in Plaintiffs' model, the disbursement figures for 1988 to 2002 do not utilize a disbursement rate adjustment since these years are the years used to derive the data to make the "adjustments."

1743:24-1744:1 (Court). Plaintiffs represent that in their Exhibit D, they changed the 93.68% figure to 99.8%. Comparing Exhibit D to PX-189-A reveals that Plaintiffs' change reduces the "Nominal Benefit to Government" by $594.23 million, from $3.971 billion to $3.377 billion, and reduces the "Accumulated Benefit" by $3.93 billion to $42.921 billion.

309. Plaintiffs represent that their Exhibit D changes the 93.68% check disbursement rate figure to 99.8%, which is an absolute difference of 6.12%, but an increase in the disbursement rate of 6.53% (6.12% / 93.68%). Yet the increase in total disbursements shown by comparing PX-189-A and Exhibit D is not 6.53%, but only 5.57% ($594.23M / $10,674.94M). This result is primarily explained because, for most years, Plaintiffs' models apply a disbursement rate that is independent from the check-clearing rate. Thus, the change in check clearing rate has no effect on the total disbursements in any of the years from 1887 through 1949. From 1950 through 1954, a blended disbursement rate is used that incorporates the check clearing rate, but disbursements in Exhibit D increase over PX-189-A by only 3.0%. Then, from 1955 through 1987, disbursements increase by 6.2%, again less than the 6.53% that would be anticipated during a period when virtually all disbursements were made by check. Only from 1988 through 1994, do disbursements increase by the 6.53% increase from 93.68% to 99.8% discussed above. When Plaintiffs begin including EFTs as disbursements in 1995, the percentage disbursement increase varies, falling from 6.5% in 1995, to 4.4% in 2002, as the proportion of money disbursed by EFT increases relative to checks. See Attachment C to Exhibit D (Column D, "EFT"). From 2002 through 2007, Exhibit D appears to apply a uniform disbursement rate that

results in a 6.2% increase in disbursements for each year.

310. Even though the Exhibit D calculations were not presented during the trial, they cast significant doubt on the content of Plaintiffs' rebuttal model. Even when they assume that virtually all checks issued are cashed (99.8%) and all EFT transactions are covered, significant differences still remain between the disbursement figures from audited financial records (1995 through 2007) and the calculated disbursement figures from Plaintiffs' model. Either the audited financial statements, see DX-371 at 371-00003 (Note to Column H, showing sources for disbursement figures as IIM audits for 1995-2007), are repeatedly wrong by tens of millions of dollars or Plaintiffs' assumption that using only CP&R and EFT data (while ignoring other disbursements such as BB transfers) will establish total disbursements is wrong. Evidence presented by Defendants permits only one conclusion: the disbursement rate calculations upon which Plaintiffs' rebuttal model depends are neither reasonable nor factually grounded.

e. Attachment Simple Interest (Exhibit "E")

312-313. The Court did not request an alternative calculation based upon simple interest instead of the compound interest used in PX-189. Moreover, the "Simple Interest" model set forth as Exhibit E to Plaintiffs' proposed findings is not based upon the primary model used by Plaintiffs in their case-in-chief, which is based upon the 10-year Treasury bond rate. Instead, Plaintiffs declare that Exhibit E is based upon the "alternative" model, which used some "blended rate" composed of private bank rates and the 5% interest mentioned in the 1841 statute. However, completely unexplained is footnote 6 to Exhibit E, which indicates that "Simple Interest" (Column I) is based on the "10 year

Treasury bond."

314-
315. The treatment of the simple interest calculation on annual nominal benefit to the government when disbursements exceed revenues (1931, 1933 and 2002) is illogical. Plaintiffs treat the negative nominal benefits as if they are invested to create a larger negative number. For instance, in 2002, the nominal benefit listed is -$6.10 million and the "Simple Interest" on this figure is -$0.99 million. A logical treatment would be to reduce the next year's nominal benefit by the $6.10 million and then calculate the simple interest on the reduced nominal number for 2003.

<u>RESPONSE TO PLAINTIFFS' PROPOSED CONCLUSIONS OF LAW</u>

I. PLAINTIFFS DO NOT ESTABLISH THAT AN AWARD OF MONEY IS PERMISSIBLE

A. <u>The Court Lacks Authority To Award Money To Plaintiffs</u>

Defendants have established that an award of money to Plaintiffs is impermissible because (1) the United States has not waived its sovereign immunity; (2) the Appropriations Clause prohibits monetary relief; (3) Plaintiffs have not stated a claim for money cognizable in equity jurisdiction; (4) monetary breach of trust claims are impliedly forbidden under the APA; (5) all claims for money were stricken from the complaint; and (6) the doctrine of laches and the statute of limitations prohibit claims for equitable restitution. <u>See</u> Defendants' Response to Plaintiffs' Memorandum in Support of Equitable Restitution and Disgorgement, at 5-28, 43-47 (April 9, 2008) (Dkt. No. 3519) ("Defendants' Response"); Defendants' Proposed Conclusions of Law, at 101-104.

In their Proposed Conclusions of Law, Plaintiffs cite <u>Bowen v. Massachusetts</u>, 487 U.S.

879 (1988), more than a dozen times, as well as the 2008 testimony of their witness, Professor Laycock, interpreting Bowen and its progeny. Plaintiffs also appear to be asserting for the first time at least two new theories of recovery: Fifth Amendment takings and statutory claims for interest.[16] Plaintiffs are unable, however, to overcome the prohibitions against monetary relief established by Defendants.[17]

1. Plaintiffs Seek Substitute Relief Not Authorized Under Bowen

Section 702 of the Administrative Procedure Act (APA), 5 U.S.C. § 702, is the sovereign immunity waiver upon which Plaintiffs rely, but their monetary claims simply do not lie within the ambit of this provision, even as construed by Bowen.[18] As this Court has previously held,

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[16] Plaintiffs continue to reinvent their case. On March 19, 2008, when they filed their claim for equitable restitution and disgorgement, they converted it from a lawsuit to compel production of an accounting required by the 1994 Act to a lawsuit to compel immediate payment of $58 billion without seeking leave to amend their Complaint. In their latest filing, Plaintiffs have seemingly expanded their exclusively monetary claims to include Fifth Amendment takings, see Plaintiffs' Proposed Findings of Fact and Conclusions of Law at 153, 171, and statutory claims for interest. Id. at 159. But Plaintiffs state these new claims outside of regular pleadings and in terms which are so vague as to preclude a full assessment of whether they, at least in their present form, would be actionable under other possibly applicable waivers of sovereign immunity. In any event, section 704 of the APA bars such claims. See 5 U.S.C. § 704.

[17] Indeed, Plaintiffs' difficulty presenting a consistent position regarding the nature of their claims is telling. For example, they assert, on the one hand, that they "are not seeking money they should have earned but never did because the trustee failed to invest collected funds," and acknowledge that such a claim "would be a money damages claim that is outside the scope of restitution." Plaintiffs' Proposed Conclusions of Law, at 158. Yet they later assert that "Plaintiffs are entitled to interest mandated by statute even if the government did not invest the income that flowed into the IIM Trust." Plaintiffs' Proposed Conclusions of Law, at 172; see generally id. at 166-174. They similarly contradict their earlier position when they assert that "Individual Indian Trust beneficiaries are entitled to imputed yields, interest, and any other comparable return on their funds for any period of delay in paying over to them their income or principal." Plaintiffs' Proposed Conclusions of Law, at 173.

[18] To the extent Plaintiffs seek to imply that the government has conceded otherwise, see Plaintiffs' Proposed Conclusions of Law, at 151-152, they misstate Defendants'

Bowen is relevant only to the extent Plaintiffs seek "the very thing" to which the 1994 Act entitles them: an accounting. See Cobell V, 91 F. Supp. 2d 1, 28 (D.D.C. 1999) ("In the case at bar, plaintiffs seek 'the very thing to which they are entitled,' an accounting of their money that actually exists in the IIM trust." [citations omitted][emphasis added]).

Moreover, Plaintiffs have abandoned the nonmonetary claims which served until now as the basis for the exercise of APA jurisdiction. The Court of Appeals has held that section 702 waives sovereign immunity here "[i]nsofar as the plaintiffs seek specific injunctive and declaratory relief – and, in particular, seek the accounting to which they are entitled . . . ." Cobell VI, 240 F.3d at 1094 (citing Bowen, 487 U.S. at 894-95). The Court later explained that it "looked to the APA to find a waiver of sovereign immunity, allowing the class members to seek nonmonetary relief against the government." Cobell XVIII, 455 F.3d 301, 306-07 (D.C. Cir. 2006) (citing Cobell VI, 240 F.3d at 1094) (emphasis added). Plaintiffs now seek only monetary relief, including two "very things" that are very different from anything Bowen might permit: prompt payment of all withheld funds and payment of any "profit" obtained through breaches of trust. This is plainly substitute relief under the Bowen analysis. The "very thing" to which Plaintiffs are entitled under the 1994 Act is information, not money.

Plaintiffs' proposed remedies are not the very thing or, for that matter, any thing to which the 1994 Act entitles them. Account holders will not receive any information they came to this court seeking, but in its place, they will receive some money which may bear no relationship whatsoever to the transactional activity in their accounts. The only remaining APA-cognizable claim in this case is whether the government is unreasonably delaying the historical accounting

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Response.

of IIM accounts. The APA takes the case no further than that.

2. Blue Fox Further Clarifies the Limits on the Section 702 Waiver

The D.C. Circuit has opined that "Bowen suggests that courts may have been reading the Tucker Act too broadly and the APA too narrowly." Transohio Sav. Bank v. Director, Office of Thrift Supervision, 967 F.2d 598, 612 (D.C. Cir. 1992). Plaintiffs would have this Court push the pendulum so far past Bowen as to create jurisdictional chaos. This is exactly the opposite direction from the one the Supreme Court subsequently identified as correct.

Ten years after Bowen, the unanimous Supreme Court, in Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255 (1999), clearly signaled its view that the pendulum had already swung too far. Blue Fox, Inc., a subcontractor on a government contract, relying upon section 702 of the APA and Bowen, asserted an equitable lien against Army funds. The amount of money at issue was undisputed, and Blue Fox sought only a lien on funds specifically appropriated for the project.

The Supreme Court nevertheless denied relief, rejecting the Ninth Circuit's reasoning that Bowen interpreted "other than money damages" in § 702 as waiving immunity for all actions "equitable" in nature. Clarifying its earlier holding, the Supreme Court stated that "Bowen's interpretation of § 702 . . . hinged on the distinction between specific relief and substitute relief, not between equitable and nonequitable categories of remedies." Blue Fox, 525 U.S. at 262. The Supreme Court held that an equitable lien does not give a plaintiff "the very thing" to which he is entitled under the Bowen analysis but merely grants a security interest which can then be used to satisfy a money claim. Id. at 262-63.

Plaintiffs try to distinguish Blue Fox by arguing that no unjust enrichment accrued to the government in Blue Fox. Plaintiffs' Proposed Findings of Fact and Conclusions of Law at 161.

However, Blue Fox does not depend on whether unjust enrichment occurred but on whether the "ultimate claim" is one "for the recovery of money." 585 U.S. at 262. Of particular relevance to this case, the Supreme Court identified the "ultimate claim" secured by an equitable lien as "usually a claim for unjust enrichment," id. at 263, which is precisely the type of claim asserted here. The Supreme Court could hardly have made clearer that a claim for unjust enrichment seeks substitute relief unavailable under section 702.

3. Section 702 Does Not Unequivocally Express Consent to Suits for "Restitution"

Plaintiffs argue that "restitution" is "other than money damages" and, therefore, permissible under section 702. However, "[t]he purpose of restitution is to deprive the defendant of any unjust enrichment . . . ." Tr. 43:13-14 (Laycock). Restitution thus functions the same as an equitable lien usually does, that is, as a means to secure a claim for unjust enrichment, which, according to Blue Fox, is not within the ambit of section 702. Theoretical distinctions between restitution and damages posited by legal scholars are simply not controlling on this issue.

Furthermore, even aside from its specific holding, Blue Fox reiterates the familiar adage that waivers of sovereign immunity must be "unequivocally expressed." 525 U.S. at 261.[19] That the term "other than money damages" does not unequivocally express a waiver for restitution claims is apparent given the breadth of potential liability that this term connotes and the overlap of restitution with other forms of liability addressed in far more specific statutory provisions.

[19] See also United States v. Nordic Vill., Inc., 503 U.S. 30 (1992), where the Supreme Court re-emphasizes certain blackletter rules, including that waivers of sovereign immunity must be "unequivocally expressed," id. at 33, and that the government's consent to suit must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires. Id. at 34.

Professor Laycock's essay on restitution, *The Scope and Significance of Restitution*, 67 Texas L. Rev. 1277 (1989), which Blue Fox cites in regard to the nature of equitable liens, see 525 U.S. at 263, opines that restitution, along with tort and contract, is one of the principal sources of civil liability. 67 Texas L. Rev. at 1277. Professor Laycock also notes that "[m]any cases of unjust enrichment are also covered by other principles, including the basic rules of tort and contract." Id. at 1283. He provides an example where someone who steals a hundred-dollar bill is unjustly enriched in the amount of one hundred dollars but has also committed a tort. Indeed, "it is the tort that makes his enrichment unjust." Id.

Given the potential reach of restitution, it would be irrational to presume that Congress, having legislated in detail the government's consent to tort liability and having created special courts and processes for resolving contract disputes, intended the short phrase "other than money damages" in section 702 to expose the government to a third "principal" form of civil liability, without any apparent limits, and which in many cases the identical predicate conduct could permit recovery for tort and contract liability, under the rubric of “restitution” that would be impermissible under the specific statutory provisions addressing those subjects.

Plaintiffs' restitution argument lacks any apparent limiting principle and potentially exposes the Treasury to forms of liability Congress may well have considered and rejected. Cf. OPM v. Richmond, 496 U.S. 414, 430 (1990) ("We would be most hesitant to create a judicial doctrine of estoppel that would nullify a congressional decision against authorization of the same class of claims."). Accordingly, Plaintiffs' reliance upon section 702 is improper, and their claims should be dismissed because section 702 does not provide the requisite waiver of sovereign immunity.

4. The Judgment Fund Is Unavailable to Plaintiffs

Plaintiffs' reliance on Republic Nat'l Bank of Miami v. United States, 506 U.S. 80 (1992), for the proposition that the Judgment Fund, authorized by 31 U.S.C. § 1304, is available to pay a monetary award to them, Plaintiffs' Proposed Findings of Fact and Conclusions of Law at 188, is misplaced. Chief Justice Rehnquist, in the portion of the opinion cited by Plaintiffs, determined that funds were available to pay a judgement if a bank prevailed on its claim of entitlement to funds generated from the sale of forfeited property. He went on, however, to identify significant limitations on the availability of the Judgment Fund:

> But further inquiry is required, for we have said that § 1304 'does not create an all-purpose fund for judicial disbursement . . . . Rather, funds may be paid out only on the basis of a judgment based on a substantive right to compensation based on the express terms of a specific statute.' *Office of Personnel Management v. OPM*, 496 U.S. 414, 432 (1990).

506 U.S. at 95. He was able to find such a "substantive right to compensation" in the provisions of 28 U.S.C. § 2465 which provides: " Upon the entry of judgment for the claimant in any proceeding to . . . forfeit property seized under any Act of Congress, such property shall be returned forthwith to the claimant or his agent." While the "property" had been converted to proceeds, he could also trace those proceeds to the Assets Forfeiture Fund of the Treasury and, "in such a case," he saw "no reason why § 2465 should not be construed as authorizing the return of proceeds." Id. at 96. In contrast, Plaintiffs have identified neither "the express terms of a specific statute" providing them with a "right to compensation" nor a fund within the Treasury in which the money they seek to have disgorged can now be found. Accordingly, the Judgment Fund is unavailable to pay the monetary award Plaintiffs seek. See Defendants' Proposed Conclusions of Law, at 101-102.

5. The Government Is Not Treated Like All Other Litigants

Plaintiffs assert that the government should be treated like all other litigants for purposes of their claim for equitable restitution. Plaintiffs' Proposed Findings of Fact and Conclusions of Law, at 148-151. However, they are unable to cite a single equitable restitution case in which the United States was a defendant. Notably, as this Court has recognized, "the [g]overnment is simply not in the position of a private litigant or a private party under traditional rules of common law or statute." Cobell V, 91 F. Supp. 2d at 29 (quoting Nevada v. United States, 463 U.S. 110, 141 (1983)); see also Nordic Vill., 503 U.S. at 39 ("Resort to the principles of trust law is also of no help to respondent. Most of the trust decisions respondent cites are irrelevant, since they involve private entities, not the Government."). Indeed, in every one of the cases involving implied equity jurisdiction cited in Plaintiffs' Memorandum In Support Of Equitable Restitution And Disgorgement, at 3-4 [Dkt. 3515], the United States was the plaintiff. The defendant in each case had been found to have violated a statutory provision and the question presented was whether the court had jurisdiction over a claim brought by the federal agency charged with enforcing the statute to recover any money gained as consequence of violating the statute.

Plaintiffs suggest that the Court's powers to award money against the United States are somehow broader here because the Court, "sitting in equity, has broad powers" to fashion restitutionary relief. Plaintiffs' Proposed Findings of Fact and Conclusions of Law at 134. Plaintiffs' suggestion that the jurisdictional infirmities in their claims may be overcome because the Court sits as a "Chancellor in Equity" cannot be squared with Cobell v. Norton (Cobell XVII), 428 F.3d 1070, 1077 (D.C. Cir. 2005), in which the Court of Appeals characterized as an "ill-founded assumption" the notion that "the 1994 Act gave the [court] the freedom of a private-law chancellor to exercise its discretion."

B. The Certified Class Cannot Be Awarded Substantial Monetary Relief

Defendants have established that because the plaintiff class was certified under Federal Rules of Civil Procedure 23(b)(1)(A) and (b)(2), monetary relief is unavailable to the existing class. Defendants' Response, at 47-69; Defendants' Proposed Conclusions of Law, at 104-107. Plaintiffs did not even address in their Proposed Conclusions of Law the limitations class certification imposes upon their requested relief.

II. PLAINTIFFS DO NOT ESTABLISH THAT THEY MET THEIR BURDEN OF PROOF ON THEIR EQUITABLE DISGORGEMENT CLAIM

A. Plaintiffs Failed To Establish The Requisite Causal Relationship Between Their Claimed Amount And Any Alleged Wrong

Defendants have established that, in equity, before money can be disgorged, a plaintiff must first demonstrate a causal connection between any claimed amount to be disgorged and an alleged wrong of the defendant. Defendants' Proposed Conclusions of Law, at 113-114. Plaintiffs did not attempt to demonstrate any such causal relationship during the recent trial and cite to no such showing in their Proposed Findings of Fact and Conclusions of Law. Plaintiffs must show that there was a breach of a fiduciary duty from which the United States benefitted. The failure to complete the statutory accounting did not cause or bring about the non-payment of funds to the class members.

Notwithstanding Plaintiffs' repeated attempts to transform an APA unreasonable delay case into something else, the United States' sole duty, in relation to this case, is to perform the accounting described in the 1994 Act. This accounting responsibility is owed to the class members as individuals and is not a duty to complete an aggregate accounting, a purported duty that is not based upon any statute or trust instrument.

Plaintiffs' assertion that "[t]he restitution claim is focused on that failure [to do the accounting mandated by the 1994 Act]," Plaintiffs' Proposed Conclusions of Law, at 162, is belied by their own expert. Professor Laycock testified in response to questions from the Court that "the claim [Plaintiffs] have focused on and think they can prove without the benefit of the full accounting is not based on the failure to account, except as an evidentiary matter, it's based on the evidence they think they have that much more money was collected than was ever disbursed." Tr. 96:2-7 (Laycock); see also Tr. 96:19-25 (Laycock) ("I think the restitution claim is now focused on that violation [the "gap" in the throughput efforts]. Not on the failure to account as such, but the inability to account continues to be relevant as an evidentiary matter to the attempt to determine the difference between the income and the disbursements."); Tr. 97:1-2 (Laycock) ("So restitution here, or specific relief here, is not intended to be directly the remedy for the failure to account, except insofar as the failure to account has evidentiary value on the amount of the disbursements"). Plaintiffs' claims in the June trial are based upon some newly alleged duty to complete an "aggregate accounting," an imagined fiduciary duty that has neither a statutory nor a common law basis.

B. Plaintiffs Failed To Meet Their Burden of Proving A Reasonable Approximation

The parties agree that Plaintiffs had the burden of proving a reasonable approximation of the amount they seek to have disgorged. Plaintiffs failed to meet their burden. See Defendants' Proposed Findings of Fact and Conclusions of Law, at 114-116.

1. Plaintiffs Are Not Entitled to the Adverse Inferences They Seek

At the close of the June trial, the Court observed that "there is no court in the country that would award damages on the basis of what we've heard here, because it would be called remote and speculative in any court of law that is considering a damages award." Tr. 1741:17-21 (the Court). Plaintiffs' witnesses, including their expert on the law of restitution, Professor Laycock, offered no support for a different standard of proof to support a restitution award.

In an effort to overcome this evidentiary hurdle, Plaintiffs' latest filing repeatedly asserts entitlement to adverse inferences based on the government's alleged failure to account. See Plaintiffs' Proposed Findings of Fact and Conclusions of Law, at 136-48.[20] Plaintiffs hold forth the alleged failure to provide an accounting, which they apparently do not want in any event, as "evidentiarily" relevant to their restitution claims. Id. at 162. Plaintiffs are not entitled to prove their restitution claims with the aid of adverse inferences for several reasons.

First, the Court's determination that the required historical accounting of Individual IIM accounts is impossible (a determination with which Defendants respectfully disagree), does not warrant adverse inferences to prove a restitution claim. An evidentiary presumption may arise when a party having a duty to keep specific records and produce them fails to perform this duty. See, e.g., Wachovia Sec., LLC v. Neuhauser, 528 F. Supp. 2d 834 (N.D.Ill. 2007) (an unfavorable evidentiary presumption arises if a party, without reasonable excuse, fails to produce evidence which is under his control). However, the United States' inability to produce detailed

[20] Plaintiffs also unaccountably assert the unremarkable proposition that ambiguous statutes are to be construed "favorably for Indians." Plaintiffs' Proposed Findings of Fact and Conclusions of Law, at 135. Plaintiffs do not reveal, however, the relevance of that particular maxim to their current claim for money, or, indeed, which statute has an ambiguity that they claim should be construed in their favor.

aggregate records that it was never required to keep (and did not keep) cannot provide a valid legal basis for the presumption Plaintiffs assert. See, e.g., Anderson v. Cryovac, Inc., 862 F.2d 910, 926 (1st Cir. 1988) ("Conversely, where the nondisclosure was accidental – as opposed to knowing or purposeful – there seems less reason for an adverse presumption.").

The basis for the Court's impossibility determination is insufficient congressional funding, Cobell XX, 532 F. Supp. 2d. at 102, which does not lead to the conclusion that Interior has committed any failure that could give rise to adverse inferences. Whether the level of congressional funding amends, suspends,[21] or clarifies the accounting duty under the 1994 Act, or none of the foregoing, Plaintiffs have offered no evidence that Interior has failed to devote all available resources to carrying out that duty.[22]

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[21] The government has previously recognized that "the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute." N.Y. Airways, Inc. v. United States, 369 F.2d 743, 748 (Ct. Cl. 1966) (internal citations omitted); accord Envtl. Def. Ctr. v. Babbitt, 73 F.3d 867, 871 (9th Cir. 1995) ("The appropriations rider does not remove this statutory duty; instead, it only temporarily removes the funds available for carrying out the duty."). Thus, congressional funding decisions may have "the effect of suspending prior statutory" duties without "suppress[ing] such duties." Trial 1.5 Tr. 7:7-9, 8:9-11 (Langbein 6/3/03 PM). While the Court held that appropriations statutes do not act to amend the underlying IIM trust obligations, Cobell XX, 532 F. Supp. 2d at 102, funding shortages can operate as a defense of an authorized suspension to an allegation that a trustee failed to discharge immediately duties that might otherwise apply. Trial 1.5 Tr. 4:6-11 (Langbein 6/3/03 AM).

[22] The Court has noted that the Department of the Interior has made great progress in its task to perform the statutory accounting including the assembly, preservation and indexing of records, as well as a very significant amount of account reconciliation in the "electronic era." See, e.g., Cobell XX, 532 F. Supp. 2d at 86. As Dr. Angel testified, there are approximately "43 miles of [Indian] records" at the National Archives and at the American Indian Records Repository. Oct 2007 Tr.1198:14-21 (Angel). Indeed, the Court found the record to be "inconclusive" on the question of whether "an adequate accounting is impossible because of the problem of missing records. 532 F. Supp. 2d at 103 n.21. In any event, the records which would be critical to the United States' defense to claims of liability brought by a particular class

But even if funding levels do not amend, suspend, or clarify Interior's accounting obligation, Defendants should not be held liable based on evidence inferred from the non-performance of a duty when the performance of that duty is legally impossible. See Cobell XX, 532 F. Supp. 2d at 102-03; see also Anti-Deficiency Act, 31 U.S.C. § 1341 (forbidding "officer[s] and employee[s]" of the federal government from authorizing an obligation or expenditure exceeding an appropriation, or in advance of an appropriation); Purpose Statute, 31 U.S.C. § 1301(a) (requiring that "[a]ppropriations . . . be applied only to the objects for which the appropriations were made except as otherwise provided by law"); OPM v. Richmond, 496 U.S. at 425 ("Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury.").

Second, the duty to account, under the 1994 Act or otherwise, is owed to individuals. The trust relationship is between the government and individual members of the Plaintiff class, not to the class as an aggregated body. See Oct. 2007 Tr. 1919: 13-1920: 5 (Fitzgerald). Because no individual beneficiary has the right to demand an accounting of every other IIM account that ever existed, id., no individual class member is entitled to share in a money judgment based on evidence inferred from the failure to account for aggregate IIM activity. Thus, the proof needed to establish Plaintiffs' restitution claims would not, in any event, be

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member appear not to be congruent with those relevant to the "failure-to-account" claims now asserted by Plaintiffs. By crafting an "alternative remedy" based upon an aggregate accounting, Plaintiffs' demand that the United States defend its actions by producing (or creating) records and data never required to be maintained by statute or regulation and when complete aggregate records cannot be produced, Plaintiffs seek to invoke evidentiary presumptions based upon the failure to produce or create the aggregate records.

provided by the accounting the government is required to perform.

Furthermore, even if the government performed an accounting of all Individual IIM accounts, such an accounting would not address facts that form essential elements of Plaintiffs' restitution claims. Such an accounting would not quantify, for example, aggregate amounts that came into the IIM System but did not get credited to Individual IIM accounts, and such amounts provide the basic measurement of Plaintiffs' claims. Determining aggregate amounts of Tribal IIM receipts and disbursements, bid deposits and refunds, and the like, would be necessary to establish what must be netted out of Plaintiffs' restitution claims, but these determinations would not be made in accountings tailored to individuals. Likewise, individual accountings would not afford a breakdown of IIM held in Treasury and IIM held outside Treasury for purposes of determining amounts that could potentially affect borrowing decisions for purposes of quantifying any alleged "benefit" to the United States. Plaintiffs' failure-to-account argument is thus a red herring, and all of the cases they cite for the proposition that all doubts must be resolved against a trustee who fails to prove individual disbursements, see Plaintiffs' Proposed Conclusions of Law, at 140-144, are wholly inapposite in this proceeding.[23]

Finally, the rule Plaintiffs seek to apply is of doubtful applicability to the government.

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[23] Plaintiffs' allegation that Defendants only produced a "few summary level documents" evidencing disbursements, Plaintiffs' Proposed Conclusions of Law, at 191, besides being immaterial because this proceeding was not intended to cover proof of individual disbursements, is also inaccurate. In addition to the vast CP&R check data and electronic transfer data – which was relied upon by Plaintiffs – Defendants also presented other individual disbursement evidence, including material in settlement packages, see DX-246, at 57-62, 46, 51-56; Tr. 810:9-813-4; Tr. 813:25-814:3 (Angel), in other source documents, see DX-483 (far-right column), and in the extensive DCV reports, which document the mapping of millions of transactions, including disbursements, see DX-151A - DX-158A. see generally Def. Response to PFOF 93-94, supra.

Availability of the general law of fiduciary relationships in making determinations involving the United States as a trustee

> does not mean . . . that all the rules governing the relationship between private fiduciaries and their beneficiaries and accountings between them necessarily apply in full vigor in an accounting claim by an Indian tribe against the United States. [Such inapplicable rules might include] the principle that once a breach of fiduciary duty is merely charged (without any supporting material), the beneficiary is entitled to recover unless the fiduciary affirmatively establishes that it properly discharged its trust, and the theory that failure to render the precise form of accounting required may be sufficient, in and of itself, to establish liability.

Navajo Tribe of Indians v. United States, 624 F.2d 981, 988 (Ct. Cl. 1980) (emphasis added); see also Cobell XVII, 428 F.3d at 1075 (1994 Act has no language "in any way appearing to grant courts the same discretion that an equity court would enjoy in dealing with a negligent trustee. Congress was, after all, mandating an activity to be funded entirely at the taxpayers' expense.").

Any presumptions arising from the failure to account in the private sector would, if applied to the government, confront countervailing presumptions regarding government officials' performance of their duties. As against the United States, there is a “presumption of regularity which attaches to the conduct of government employees.” Red Lake Band v. United States, 17 Cl. Ct. 362, 408-09 (1989). “[T]here is a strong presumption that government officials act in good faith and within the scope of their authority.” White Mountain Apache Tribe of Ariz. v. United States, 26 Cl. Ct. 446, 449 (1992), aff’d, 5 F.3d 1506 (Fed. Cir. 1993) (citing Andrade v. United States, 485 F.2d 660, 665 (Ct. Cl. 1973)).

IIM account records are government records compiled by public officials and constitute substantive and probative evidence of the facts reported therein. See, e.g., Fed. R. Evid. 803(6), (7), (8).[24] "[The] presumption of regularity surrounds public officers to the extent that, in the absence of contrary evidence, a reviewing court assumes that they have properly discharged their official duties." Kephart v. Richardson, 505 F.2d 1085, 1090 (3rd Cir. 1974), (citing 2 Davis, Administrative Law Treatise § 11.06). In Kephart, the court held that this presumption leads to the conclusion – in the absence of contradictory evidence from the plaintiff – that "the Secretary properly compiled the . . . data" appearing in official records. The court held that the burden rested with the plaintiff to introduce evidence demonstrating the accuracy (or inaccuracy) of the information that had been submitted to the Secretary "in the first instance." Id. at 1090.

Moreover, Defendants have presented substantial evidence of regularity in practice, including oversight by Treasury and GAO, and the settled account packages evidencing such oversight. See, e.g., Def. PFOF 207-225. Plaintiffs cannot simply rely on the government's alleged inability to produce source documents for a particular IIM transaction as substantive proof that such transactions did not occur or that the data reported in the IIM electronic database is erroneous. See, e.g., Fed. R. Evid. 1004 (original not required and other evidence of the content of a writing is admissible if all originals have been lost or destroyed or original cannot be obtained by any available judicial process or procedure).

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[24] Congress ultimately determines the scope of trust responsibilities, including which records must be held indefinitely. Congress has specifically provided that government records are subject to the Federal Records Act, 44 U.S.C. chs. 21, 29, 31 and 33, which provides for the creation, preservation, and disposition of federal records under guidance provided by the Archivist of the United States. 44 U.S.C. § 2904; see also H.R. Rep. No. 105-163, 105th Cong., 1st Sess. 64 (Jul. 1, 1997) ("NARA [National Archives Records Administration] . . . has oversight responsibilities for Federal records management functions," and the Committee "expects OST [Office of the Special Trustee] to work closely with NARA in developing and implementing records management improvements.") No statutory provision supports Plaintiffs' assertion that the government has a greater duty to preserve documents because they may pertain to IIM accounts.

Instead, Plaintiffs must introduce evidence to rebut the presumption of regularity. See also Breeden v. Weinberger, 493 F.2d 1002, 1005-06 (4th Cir. 1974); Parsons v. United States, 670 F.2d 164, 166 (Ct. Cl. 1982) (presumption applied even though Army destroyed documents; "It is well established that there is a presumption that public officers perform their duties correctly, fairly, in good faith, and in accordance with law and governing regulations, and the burden is on the plaintiff to prove otherwise."); cf. DeSario v. Thomas, 139 F.3d 80, 97 (2d Cir. 1998) (rejecting argument that plaintiffs should not have burden of proof as to information that is not within their knowledge; court noted that "plaintiffs have discovery procedures at their disposal in this action . . . and therefore bear no greater burden than in any other lawsuit."). Thus, specifically in the case of trust documents, any "lack of underlying documentation is more likely due to the lapse of time and difficulty of assembling materials than to theft or abuse of trust." Red Lake Band, 17 Cl. Ct. at 408-09; see also Fort Mohave Indian Tribe v. United States, 32 Fed. Cl. 29, 42 (1994) (reconstructing what happened over three decades ago proved impossible, but "errors appear far more likely to have occurred and larger in scope when viewed under the sharp focus of hindsight rather than when placed in an appropriate historical context"), aff'd, 64 F.3d 677 (Fed. Cir. 2005) (Table, text at 1995 WL 495536).

Indeed, if any adverse inferences are to be made in this proceeding, they should apply against Plaintiffs' evidence. One of the twelve maxims of equity jurisprudence is *vigilantibus, non dormientibus, jura subveniunt*: "delay defeats equities, or equity aids the vigilant and not the indolent." J. McGhee, SNELL'S EQUITY §§ 3-16 to 3-19 (30th ed. 2000). Equity does not come to the aid of "stale demands, where a party has slept upon his right and acquiesced for a great length of time." Id. at § 3-16.

After years of disclaiming that they sought anything but historical accountings for Individual IIM account holders, Plaintiffs now rely upon an aggregate throughput analysis dating back more than a century to support their monetary claims. Any lack of underlying documentation is a result of Plaintiffs' delay and the equitable doctrine of laches defeats any claim that incomplete historical information warrants adverse inferences against the government. See City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 221 (2005) (holding that the Tribe's "long delay in seeking equitable relief . . . evoke[s] the doctrine of laches" and "render[ed] inequitable" the tax exemption sought by the Tribe).

2. Plaintiffs' Model Treats Osage Headright Revenues Improperly

Defendants established that only the portion of Osage Headright money that enters the IIM System is relevant to these proceedings. Defendants' Proposed Findings of Fact and Conclusions of Law, at 22-25, 117; Defendants' Response, at 104-107; see also Defendants' Response to the Osage Nation's Proposed Findings of Fact and Conclusions of Law (filed July 21, 2008). In Plaintiffs' Proposed Conclusions of Law, at 188-191, Plaintiffs provide no new analysis of the Osage headright revenue and thus, for the reasons established previously by Defendants, Plaintiffs continue to treat this revenue improperly in their calculation of any putative unjust enrichment amount.

III. PLAINTIFFS DO NOT ESTABLISH THAT AN AWARD OF INTEREST AGAINST THE GOVERNMENT IS PERMISSIBLE

Defendants have established that Plaintiffs are not entitled to any money based on a supposed "benefit to the government," because any such amount would constitute prejudgment interest which, as a matter of law, cannot be awarded against the United States. Defendants' Response, at 114-116; Defendants' Proposed Conclusions of Law, at 118-122. This prohibition on interest remains in force whether Plaintiffs calculate it by using the 10–year Treasury bond rate, by making a claim under the 1994 Act, or by making a claim under the 1841 statute. Defendants' Response, at 116-117; Defendants' Proposed Conclusions of Law, at 118-122.

A. Plaintiffs Have Not Demonstrated a Benefit Conferred on the Government

Defendants have demonstrated that, as a matter of law, no benefit was conferred on the United States because (1) Plaintiffs failed to show the existence of IIM funds available for use by the government, (2) even if unexplained IIM funds exist, Defendants established that no such funds could affect the borrowing decisions of the United States, and (3) the use of the 10-year Treasury Bond rate as a proxy for borrowing costs saved is unreasonable. See Defendants' Proposed Conclusions of Law, at 118-122; Defendants' Response at 116-117.

In their Proposed Conclusions of Law, Plaintiffs provide no new legal analysis on the issue of benefit conferred upon the government. They do, however, include several misstatements of fact. Plaintiffs improperly cite Dr. Kehoe for the proposition that IIM funds held in commercial banks are public money. Plaintiffs' Proposed Conclusions of Law, at 176. This is an inaccurate description of such money and Dr. Kehoe testified to no such thing. See Defendants' Response to Pl. PFOF 272, supra.

Plaintiffs employ the term "agent banks" when referring to commercial banks holding IIM deposits. Plaintiffs' Proposed Conclusions of Law, at 176-178. In testifying about these banks, Defendants' witnesses never used the term "agent banks," and Defendants are unclear what exactly Plaintiffs mean with this term. See Defendants' Response to Pl. PFOF 270, supra. Particularly misleading is Plaintiffs' reference to these institutions as "financial agents of the Treasury Department." Plaintiffs' Proposed Conclusions of Law, at 177. As Dr. Kehoe explained in his testimony, the BIA, not the Treasury Department, made the decisions about where, when, and how to invest IIM. See, e.g., Tr. 1097:13-18; 1098:5-7; 1100:2-4; 1103:25-1104:2 (Kehoe).

B. Interest Cannot be Awarded as "Specific Relief" under the 1994 Act

1. The Trigger for an Interest Award Under the 1994 Act Has Not Occurred

Plaintiffs' suggestion that the aggregate throughput analysis for the IIM System constitutes "a reconciliation process for individual Indian money accounts" which, under 25 U.S.C. § 4012(1), might trigger an interest obligation, see Plaintiffs' Proposed Findings of Fact and Conclusions of Law, at 167-68, is unfounded. As the quoted language itself states, the relevant process is a reconciliation of accounts, not of aggregate throughput. This characterization of Interior's accounting duties is reflected throughout the 1994 Act. See, e.g., 1994 Act §§ 303(b)(2)(A) (defining Special Trustee's duties: "Monitor reconciliation of trust accounts.-The Special Trustee shall monitor the reconciliation of tribal and Individual Indian Money trust accounts to ensure that the Bureau provides the account holders, with a fair and accurate accounting of all trust accounts."); 304 (requiring Secretary to submit "a report identifying for each tribal trust fund account" which "shall include - (1) a description of the Secretary's methodology in reconciling trust fund accounts;" and attestations by each account holder that "(a) . . . the account holder accepts the balance as reconciled by the Secretary; or (B) the account holder disputes the balance of the account holder's account as reconciled by the Secretary and statement explaining why the account holder disputes the Secretary's reconciled balance;"). Interior's ability to provide such a reconciliation for Individual IIM accounts was the subject of the October 2007 hearing and, as a result, this Court's January 30, 2008 Opinion repeatedly refers to Interior's attempted reconciliation of IIM accounts. The Court ultimately determined that such a reconciliation is impossible and, as a result, this latest proceeding was conducted to determine "an appropriate remedy," Cobell XX, 532 F. Supp. 2d at 103, for Interior's inability to provide the reconciliation – not to conduct the reconciliation itself.

2. Plaintiffs Overstate Their Entitlement to Retroactive Interest Even if an Interest Award Under the 1994 Act Had Been Triggered

Even if the 1994 Act could somehow be construed to trigger a retroactive interest award in this case,[25] Plaintiffs' claim is overstated. See Plaintiffs' Proposed Findings of Fact and Conclusions of Law, at 119-24; 166-75; 182-86.

Section 104 of the 1994 Act provides that the Secretary

> shall make payments to an individual Indian in full satisfaction of any claim of such individual for interest on amounts deposited or invested on behalf of such individual before October 25, 1994, retroactive to the date that the Secretary began investing individual Indian monies on a regular basis, to the extent that the claim is identified –
>
> (1) by a reconciliation process of individual Indian money accounts, or
>
> (2) by the individual and presented to the Secretary with supporting documentation, and is verified by the Secretary pursuant to the Department's policy for addressing accountholder losses.

25 U.S.C. § 4012.

By its terms, this provision only applies to monies that had been actually deposited or invested on behalf of individual Indians. It therefore provides a remedy only in cases in which money was actually deposited or invested, but interest earned thereon was not credited to the

[25] As Defendants have demonstrated, Plaintiffs must assert any such claim in the Court of Federal Claims. See Defendants' Response, at 116-117; Defendants' Proposed Conclusions of Law, at 119.

Individual IIM account.

The legislative history of the 1994 Act confirms that interest may be paid only on amounts actually deposited or invested. A provision in H.R. 1846 requiring the Secretary to make payments to individual Indians "in an amount equal to the interest which would have been earned if funds of such Indian tribe or individual Indians which were subject to the Act of June 24, 1938 (25 U.S.C.§ 162a), had been deposited or invested in accordance with such Act," was considered but omitted from the final version of the statute.[26] H.R. Rep. 103-778 at 24-25, 1994 U.S.C.C.A.N. 3467, 3481-82.

Furthermore, the "date that the Secretary began investing individual Indian monies on a regular basis," is not the inception date of IIM accounts. Legislative history reflects that this language refers to the centralization of the investment function under the Office of Trust Funds Management in approximately 1966:

> Funds have been held in trust for American Indians by the Federal Government since 1820. The Bureau of Indian Affairs (BIA) has had the authority to invest Indian Trust Funds since 1918, however, it was not until 1966 that the BIA exercised its full range of investment authority. The Office of Trust Funds Management (OTFM) within the BIA is responsible for implementing the fiduciary responsibility of ensuring that all proper controls and accountability are maintained with regard to the Indian trust funds.

H.R. Rep. 103-778 at 9, 1994 U.S.C.C.A.N. 3467, 3468.

C. Interest Cannot be Awarded as "Specific Relief" under the 1841 Statute

Defendants have established that the 1841 Statute does not mandate the payment of interest on Indian funds, including IIM funds, and cannot provide a basis for the type of specific

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[26] The payment of imputed interest (interest that should have been earned but was not) is a damages claim, not a restitutionary claim. Tr. 93:12-18; 84:111-22 (Laycock).

relief discussed in Bowen, 487 U.S. 879. Defendants' Proposed Conclusions of Law, at 119-121.

D. Plaintiffs Are Not Entitled to Compound Interest

Plaintiffs' argument that "compound interest" is required must also be rejected.[27] Plaintiffs were unable to prove their "avoidance of borrowing costs" theory at trial, and did not even attempt to prove that the government either received compound interest on IIM funds or gained a commensurate profit.

Additionally, the payment of compound interest to Plaintiffs which has no proven relationship to any benefit received by the United States (the "unjust enrichment") is merely the payment of prejudgment interest, an element of money damages, for which sovereign immunity has not been waived. In a case not involving the sovereign, a combination of remedies, equitable and legal, would not create jurisdictional issues. Here, however, such mixed relief is barred because money damages against the United States are unavailable in this forum.

IV. PLAINTIFFS DO NOT EXPLAIN HOW THE RES JUDICATA PROBLEMS CREATED BY THEIR RESTITUTION CLAIM CAN BE RESOLVED

Defendants have established that any award of money creates irremediable res judicata problems because the contour of Plaintiffs' equitable restitution claim is nebulous and a plan for

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[27] Plaintiffs assert in the introduction to Section XVII:

> The government, as trustee, is chargeable with compound interest because it (a) has received compound interest; (b) has gained a profit that cannot be ascertained, but is presumably at least equal to compound interest; or (c) is its duty to accumulate, invest, and reinvest income that flows into the Trust from Trust lands and through the investment and reinvestment of the Trust funds that it holds directly and through its agent banks.

Plaintiffs' Proposed Conclusions of Law, at 182-83.

distributing any amount awarded is non-existent. See Defendants' Response, at 82-83; Defendants' Proposed Conclusions of Law, at 122. In their Proposed Findings of Fact and Conclusions of Law, Plaintiffs neither clarify the nature of their claim nor propose any distribution plan. Instead, they fail to address the res judicata problem in any way.

Dated: July 21, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on July 21, 2008 the foregoing *Defendants' Response to Court's Notice to the Parties and to Plaintiffs' Proposed Findings of Fact and Conclusions of Law Following the June 2008 Trial* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

Earl Old Person (*Pro se*)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417
Fax (406) 338-7530

/s/ Kevin P. Kingston
Kevin P. Kingston

AU Section 150

Generally Accepted Auditing Standards

(Supersedes SAS No. 1, section 150)

Source: SAS No. 95; SAS No. 98; SAS No. 102; SAS No. 105; SAS No. 113.

Effective for audits of financial statements for periods beginning on or after December 15, 2001, unless otherwise indicated.

.01 An independent auditor plans, conducts, and reports the results of an audit in accordance with generally accepted auditing standards (GAAS). Auditing standards provide a measure of audit quality and the objectives to be achieved in an audit. Auditing procedures differ from auditing standards. Auditing procedures are acts that the auditor performs during the course of an audit to comply with auditing standards.

Auditing Standards

.02 The general, field work, and reporting standards (the 10 standards) approved and adopted by the membership of the AICPA, as amended by the AICPA Auditing Standards Board (ASB), are as follows:

General Standards

1. The auditor must have adequate technical training and proficiency to perform the audit.

2. The auditor must maintain independence in mental attitude in all matters relating to the audit.

3. The auditor must exercise due professional care in the performance of the audit and the preparation of the report.

Standards of Field Work

1. The auditor must adequately plan the work and must properly supervise any assistants.

2. The auditor must obtain a sufficient understanding of the entity and its environment, including its internal control, to assess the risk of material misstatement of the financial statements whether due to error or fraud, and to design the nature, timing, and extent of further audit procedures.

3. The auditor must obtain sufficient appropriate[1] audit evidence by performing audit procedures to afford a reasonable basis for an opinion regarding the financial statements under audit.

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[1] See paragraph .06 of section 326, *Audit Evidence*, for the definition of the term *appropriate*. [Footnote added, effective for audits of financial statements for periods beginning on or after December 15, 2006, by Statement on Auditing Standards No. 105.]

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Standards of Reporting[2]

1. The auditor must state in the auditor's report whether the financial statements are presented in accordance with generally accepted accounting principles (GAAP).[3]
2. The auditor must identify in the auditor's report those circumstances in which such principles have not been consistently observed in the current period in relation to the preceding period.
3. When the auditor determines that informative disclosures are not reasonably adequate, the auditor must so state in the auditor's report.
4. The auditor must either express an opinion regarding the financial statements, taken as a whole, or state that an opinion cannot be expressed, in the auditor's report. When the auditor cannot express an overall opinion, the auditor should state the reasons therefor in the auditor's report. In all cases where an auditor's name is associated with financial statements, the auditor should clearly indicate the character of the auditor's work, if any, and the degree of responsibility the auditor is taking, in the auditor's report.

[As amended, effective for audits of financial statements for periods beginning on or after December 15, 2006, by Statement on Auditing Standards No. 105. As amended, effective for audits of financial statements for periods beginning on or after December 15, 2006, by Statement on Auditing Standards No. 113.]

.03 Rule 202, *Compliance With Standards*, of the AICPA Code of Professional Conduct [ET section 202.01], requires an AICPA member who performs an audit (the auditor) to comply with standards promulgated by the ASB.[4] The ASB develops and issues standards in the form of Statements on Auditing Standards (SASs) through a due process that includes deliberation in meetings open to the public, public exposure of proposed SASs, and a formal vote. The SASs are codified within the framework of the 10 standards.

.04 The nature of the 10 standards and the SASs requires the auditor to exercise professional judgment in applying them. Materiality and audit risk also underlie the application of the 10 standards and the SASs, particularly those related to field work and reporting.[5] When, in rare circumstances, the auditor departs from a presumptively mandatory requirement, the auditor must document in the working papers his or her justification for the departure and how the alternative procedures performed in the circumstances were sufficient to achieve the objectives of the presumptively mandatory requirement. [As amended, effective December 2005, by Statement on Auditing Standards

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[2] The reporting standards apply only when the auditor issues a report. [Footnote added, effective for audits of financial statements for periods beginning on or after December 15, 2006, by Statement on Auditing Standards No. 113.]

[3] When an auditor reports on financial statements prepared in accordance with a comprehensive basis of accounting other than generally accepted accounting principles, the first standard of reporting is satisfied by stating in the auditor's report that the basis of presentation is a comprehensive basis of accounting other than generally accepted accounting principles and by expressing an opinion (or disclaiming an opinion) on whether the financial statements are presented in conformity with the comprehensive basis of accounting used. [Footnote added, effective for audits of financial statements for periods beginning on or after December 15, 2006, by Statement on Auditing Standards No. 113.]

[4] In certain engagements, the auditor also may be subject to other auditing requirements, such as Government Auditing Standards issued by the comptroller general of the United States, or rules and regulations promulgated by the U.S. Securities and Exchange Commission. [Footnote renumbered by the issuance of Statement on Auditing Standards No. 105, March 2006. Footnote subsequently renumbered by the issuance of Statement on Auditing Standards No. 113, November 2006.]

[5] See section 312, *Audit Risk and Materiality in Conducting an Audit*. [Footnote renumbered by the issuance of Statement on Auditing Standards No. 105, March 2006. Footnote subsequently renumbered by the issuance of Statement on Auditing Standards No. 113, November 2006.]

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No. 102. As amended, effective for audits of financial statements for periods beginning on or after December 15, 2006, by Statement on Auditing Standards No. 113.]

Interpretive Publications

.05 *Interpretive publications* consist of auditing Interpretations of the SASs, appendixes to the SASs,[6] auditing guidance included in AICPA Audit and Accounting Guides, and AICPA auditing Statements of Position.[7] Interpretive publications are not auditing standards. Interpretive publications are recommendations on the application of the SASs in specific circumstances, including engagements for entities in specialized industries. An interpretive publication is issued under the authority of the ASB after all ASB members have been provided an opportunity to consider and comment on whether the proposed interpretive publication is consistent with the SASs. [As amended, effective September 2002, by Statement on Auditing Standards No. 98.]

.06 The auditor should be aware of and consider interpretive publications applicable to his or her audit. If the auditor does not apply the auditing guidance included in an applicable interpretive publication, the auditor should be prepared to explain how he or she complied with the SAS provisions addressed by such auditing guidance.

Other Auditing Publications

.07 *Other auditing publications* include AICPA auditing publications not referred to above; auditing articles in the *Journal of Accountancy* and other professional journals; auditing articles in the AICPA *CPA Letter*; continuing professional education programs and other instruction materials, textbooks, guide books, audit programs, and checklists; and other auditing publications from state CPA societies, other organizations, and individuals.[8] Other auditing publications have no authoritative status; however, they may help the auditor understand and apply the SASs.

.08 If an auditor applies the auditing guidance included in an other auditing publication, he or she should be satisfied that, in his or her judgment, it is both relevant to the circumstances of the audit, and appropriate. In determining whether an other auditing publication is appropriate, the auditor may wish to consider the degree to which the publication is recognized as being helpful in understanding and applying the SASs and the degree to which the issuer or author is recognized as an authority in auditing matters. Other auditing

[6] Appendixes to SASs referred to in paragraph .05 of this section do not include previously issued appendixes to original pronouncements that when adopted modified other SASs. [Footnote added, effective September 2002, by Statement on Auditing Standards No. 98. Footnote renumbered by the issuance of Statement on Auditing Standards No. 105, March 2006. Footnote subsequently renumbered by the issuance of Statement on Auditing Standards No. 113, November 2006.]

[7] Auditing Interpretations of the SASs are included in the codified version of the SASs and are cross-referenced from the related AU sections in Appendix C. AICPA Audit and Accounting Guides and auditing Statements of Position are listed in Appendix D. [Footnote renumbered by the issuance of Statement on Auditing Standards No. 98, September 2002. Footnote subsequently renumbered by the issuance of Statement on Auditing Standards No. 105, March 2006. Footnote subsequently renumbered by the issuance of Statement on Auditing Standards No. 113, November 2006.]

[8] The auditor is not expected to be aware of the full body of other auditing publications. [Footnote renumbered by the issuance of Statement on Auditing Standards No. 98, September 2002. Footnote subsequently renumbered by the issuance of Statement on Auditing Standards No. 105, March 2006. Footnote subsequently renumbered by the issuance of Statement on Auditing Standards No. 113, November 2006.]

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publications published by the AICPA that have been reviewed by the AICPA Audit and Attest Standards staff are presumed to be appropriate.[9]

Effective Date

.09 This section is effective for audits of financial statements for periods beginning on or after December 15, 2001.

[9] Other auditing publications published by the AICPA that have been reviewed by the AICPA Audit and Attest Standards staff are listed in AU Appendix F. [Footnote renumbered by the issuance of Statement on Auditing Standards No. 98, September 2002. Footnote subsequently renumbered by the issuance of Statement on Auditing Standards No. 105, March 2006. Footnote subsequently renumbered by the issuance of Statement on Auditing Standards No. 113, November 2006.]